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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
25 March-12 April 1996

SUMMARY OF THE PROCEEDINGS OF THE PREPARATORY COMMITTEE DURING THE PERIOD 25 MARCH-12 APRIL 1996

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I. INTRODUCTION

1. The Preparatory Committee on the Establishment of an International Criminal Court met at United Nations Headquarters from 25 March to 12 April 1996, in accordance with General Assembly resolution 50/46 of 11 December 1995.

2. Under paragraph 2 of that resolution, the Preparatory Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. 1/

3. Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, opened the session, represented the Secretary-General and made an introductory statement.

4. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Preparatory Committee; Mr. Manuel Rama-Montaldo, Deputy Director for Research and Studies, acted as Deputy Secretary; Ms. Mahnoush Arsanjani and Ms. Sachiko Kuwabara-Yamamoto, Senior Legal Officers; Mr. George Korontzis, Legal Officer, and Ms. Virginia Morris and Ms. Darlene Prescott, Associate Legal Officers, acted as assistant secretaries.

5. At the 1st meeting, on 25 March 1996, the Preparatory Committee elected its Bureau, as follows:

Chairman: Mr. Adriaan Bos (Netherlands)

Vice-Chairmen: Mr. Cherif Bassiouni (Egypt)
Mrs. Silvia A. Fernández de Gurmendi (Argentina)
Mr. Marek Madej (Poland)

Rapporteur: Mr. Jun Yoshida (Japan)

6. Also at the 1st meeting, the Preparatory Committee adopted the following agenda (A/AC.249/L.1):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Further consideration of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission and, taking into account the different views expressed during the meetings, drafting of texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

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6. Adoption of the report.

7. The Preparatory Committee had before it, in addition to the draft statute for an international criminal court adopted by the International Law Commission (ILC) at its forty-sixth session, 2/ the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 3/ the comments received pursuant to paragraph 4 of General Assembly resolution 49/53 of 9 December 1994 on the establishment of an international criminal court (A/AC.244/1 and Add.1-4) and a preliminary report submitted by the Secretary-General pursuant to paragraph 5 of that resolution, on provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court (A/AC.244/L.2).

II. ORGANIZATION AND METHOD OF WORK

8. The work of the Preparatory Committee during its March-April session followed the programme suggested by the Bureau and focused on the following questions: scope of jurisdiction and definition of crimes, at its 1st to 6th meetings, on 25, 26 and 27 March; general principles of criminal law, at its 7th to 10th meetings, on 28 and 29 March; complementarity, at its 11th to 14th meetings, on 1 and 2 April; trigger mechanism, at its 15th to 18th meetings, on 3 and 4 April; and cooperation between the court and national jurisdictions, at its 19th to 23rd meetings, on 8, 9 and 10 April. A summary of the discussions is reflected in section III, A to F, of the report.

9. During the Committee's consideration of the above questions, delegations put forward various suggestions and proposals, some of which were in written form. For the purpose of illustrating some of the major issues involved, they were brought together and compiled under the following headings: general principles of criminal law (A/AC.249/CRP.9); complementarity (A/AC.249/CRP.9/Add.1); trigger mechanism (A/AC.249/CRP.9/Add.2 and 3); and cooperation between the court and national jurisdictions (A/AC.249/CRP.9/Add.5) (see annexes II-V to the present summary). These compilations were by no means exhaustive in their inclusion of all suggestions and proposals put forward by the delegations; delegations were encouraged to submit additions to the Secretariat for inclusion. The Committee did not discuss these papers and does not wish to prejudge the future positions of delegations.

10. With respect to the definition of crimes, a series of Chairman's informal texts was issued in a document (A/AC.249/CRP.9/Add.4) under the following headings: genocide, aggression, war crimes and crimes against humanity (see annex I to the present summary). The document also included a compilation of proposals and suggestions submitted by delegations. These are also illustrative texts which are not exhaustive and do not necessarily reflect any general views on the debate. The Committee did not discuss the document.

11. At the 22nd meeting of the Preparatory Committee, on 9 April, the Chairman, on behalf of the Bureau, put forward a provisional plan of work for the August session. At the 23rd meeting, on 10 April, the Chairman put forward a list of questions to be considered during the August session.

III. FURTHER DISCUSSION OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION AND, TAKING INTO ACCOUNT THE DIFFERENT VIEWS EXPRESSED DURING THE MEETINGS, DRAFTING OF TEXTS, WITH A VIEW TO PREPARING A WIDELY ACCEPTABLE CONSOLIDATED TEXT OF A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT AS A NEXT STEP TOWARDS CONSIDERATION BY A CONFERENCE OF PLENIPOTENTIARIES

A. Scope of jurisdiction and definition of crimes

1. Article 20. Crimes within the jurisdiction of the court

(a) Scope of jurisdiction

12. There was general agreement concerning the importance of limiting the jurisdiction of the court to the most serious crimes of concern to the international community as a whole, as indicated in the second paragraph of the preamble, to avoid trivializing the role and functions of the court and interfering with national court jurisdiction. Several delegations emphasized the importance of consistently applying the jurisdictional standard referred to in the second paragraph of the preamble to the various categories of crimes.

(b) Definition of crimes

13. There was general agreement that the crimes within the jurisdiction of the court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine lege). A number of delegations expressed the view that the crimes should be clearly defined in the statute. However, some delegations envisaged the statute as a procedural instrument and expressed concern about possible duplication of or interference with the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind.

(c) Method of definition

14. Several delegations expressed the view that the crimes referred to in subparagraphs (a) to (d) should be defined by enumeration of the specific offences rather than by reference to the relevant legal instruments, to provide greater clarity and transparency, to underscore the customary law status of the definitions to avoid a lengthy debate on the customary law status of various instruments, to avoid possible challenges by States that were not parties to the relevant agreements, to avoid the difficulties that might arise if the agreements were subsequently amended and to provide a uniform approach to the definitions of the crimes irrespective of whether they were the subject of a convention. Some delegations suggested that the two approaches could be combined for crimes covered by widely accepted conventions. There were also proposals to define the crimes by reference to the relevant conventions such as the Genocide Convention and the Geneva Conventions. There was a further proposal to amend article 20 to indicate that the court should apply the relevant international conventions and other sources of international law in interpreting and applying the definitions of crimes. Several delegations held

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the view that the statute should codify customary international law and not extend to the progressive development of international law.

(d) Exhaustive or illustrative definition

15. Several delegations expressed a preference for an exhaustive rather than an illustrative definition of the crimes to ensure respect for the principle of legality, to provide greater certainty and predictability regarding the crimes that would be subject to international prosecution and adjudication and to ensure respect for the rights of the accused. However, some delegations expressed the view that it might not be possible to envisage all of the various offences, that exhaustive definitions might excessively restrict the jurisdiction of the court and that in some instances it might be useful to retain an element of flexibility to permit the continuing development of the law.

(e) Elements of the crimes

16. Some delegations expressed the view that the constituent elements of the crimes should be set forth in the statute or in an annex to provide the clarity and precision required for criminal law, to provide additional guidance to the prosecution and the court, to ensure respect for the rights of the accused and to avoid any political manipulation of the definitions. It was further stated by some delegations that States, and not judges, should be responsible for legislating the elements of the crimes. It was also suggested that the statute could provide a mechanism under which the court would elaborate the elements similar to the International Tribunal for the former Yugoslavia. However, other delegations expressed the view that it was not necessary to provide the detailed elements of the crimes, that the general definitions contained in the relevant instruments had been sufficiently precise for their practical application and that an elaboration of the elements of the crimes would be a complex and time-consuming task.

(f) Categories of responsible individuals

17. Several delegations expressed the view that it was important to consider the categories of individuals who could incur responsibility for the various crimes in the definitions thereof or in a general provision. Attention was drawn to the draft prepared by a committee of experts at Siracusa concerning the former approach.

2. Article 20, subparagraph (a) - Genocide

(a) Inclusion

18. There was general agreement that genocide met the jurisdictional standard referred to in the second paragraph of the preamble.

(b) Definition

19. Several delegations expressed the view that the Convention on the Prevention and Punishment of the Crime of Genocide provided an adequate basis for the definition of that crime; that the definition was authoritative, widely accepted and had attained the status of customary law, with reference being made to the advisory opinion of the International Court of Justice in this respect; and that the use of that definition would promote uniform jurisprudence in the field of international law. Several delegations also expressed the view that article II of the Convention should be reproduced without change. It was emphasized that the Preparatory Committee was not the appropriate forum for considering amendments to the Convention or for undertaking the codification or progressive development of law rather than defining the jurisdiction of the court with respect to existing law.

20. Some delegations suggested that various aspects of the definition contained in article II required further clarification to provide the necessary guidance to the court in its interpretation and application. With regard to the chapeau of article II, some delegations suggested that it might be necessary to clarify the intent required for various categories of individual. However, other delegations suggested that the question of intent should be addressed under the applicable law or the general provisions of criminal law. Some delegations also suggested that the term "in part" required further clarification. Some delegations further suggested that consideration should be given to extending the definition to include social and political groups, while recognizing that that question could also be addressed in connection with crimes against humanity.

21. As regards article II, subparagraph (b), the view was expressed that the term "mental harm" required further clarification.

22. Regarding article II, subparagraph (d), the view was expressed that the phrase "imposing measures intended to prevent births within the group" required further clarification and could be replaced by the phrase "preventing births within the group".

23. With regard to article II, subparagraph (e), the view was expressed that the provision concerning forcible transfers of children should be expanded to include persons who were members of a particular group.

(c) Ancillary crimes

24. Several delegations drew attention to the ancillary crimes addressed in article III of the Genocide Convention, with some delegations suggesting the inclusion of that provision in the definition of genocide and other delegations suggesting that those crimes should be addressed in a general provision in relation to the various crimes.

3. Article 20, subparagraph (b) - Aggression

(a) Inclusion

25. There were different views concerning the inclusion of aggression.

26. Some delegations were of the view that aggression should be included to avoid a significant gap in the jurisdiction of the court, as aggression was one of the most serious crimes of concern to the entire international community, and that it should be regarded as a core crime under general international law; to create a deterrent and to avoid the impunity of the responsible individuals by providing a forum for their prosecution; to enhance the role and stature of the court; to avoid any negative inference concerning individual criminal responsibility under customary law contrary to the Nürnberg Tribunal precedent affirmed by the General Assembly; and to avoid adopting a retrogressive statute 50 years after the Nürnberg and Tokyo tribunals and the adoption of the Charter of the United Nations.

27. Some delegations supported the inclusion of this crime if general agreement could be reached on its definition and on the appropriate balance of the respective roles and functions of the court and the Security Council, without delaying the establishment of the court.

28. Still other delegations were of the view that it should not be included because there was no generally accepted definition of aggression for the purpose of determining individual criminal responsibility; there was no precedent for individual criminal responsibility for acts of aggression in contrast to wars of aggression; it would be difficult and inappropriate to attempt to elaborate a sufficiently clear, precise and comprehensive definition of aggression; any attempt to elaborate a generally acceptable definition would substantially delay the establishment of the court; the crime of aggression necessarily involved political and factual issues (such as territorial claims) that were inappropriate for adjudication by a criminal court; its inclusion could subject the court to the struggle for political influence among States; the court would still have jurisdiction over other crimes that often accompanied acts of aggression; it would be difficult to achieve an appropriate relationship between the judicial functions of the court and the political functions entrusted to the Security Council under the Charter of the United Nations (for a discussion of this issue and art. 23, see paras. 153-155); and its inclusion could jeopardize the general acceptance or universality of the court.

29. Some delegations expressed support for providing a review mechanism under which aggression might be added at a later stage to avoid delaying the establishment of the court pending the completion of a generally accepted definition. Other delegations were opposed to that view. The view was also expressed that appropriate language could be added to the preamble or an operative provision to avoid any negative inferences regarding individual criminal responsibility for such crimes under customary law. (See also the discussion of treaty-based crimes below.)

(b) Definition

30. Several delegations noted the absence of a generally agreed definition of aggression for the purpose of determining individual criminal responsibility under treaty law. Reference was made to various relevant instruments, including Article 2, paragraph 4, of the Charter of the United Nations, the Nürnberg Tribunal Charter, the Tokyo Tribunal Charter, General Assembly resolution 3314 (XXIX), the Draft Code and the new definition therefor, and the Siracusa draft.

31. Some delegations were of the view that the Nürnberg Charter provided a precise definition of particularly serious offences resulting in individual criminal responsibility under customary law, while others described the definition contained therein as too imprecise for these purposes, or too restrictive or outdated.

32. Some delegations expressed the view that the General Assembly resolution provided a generally accepted definition of aggression and contained elements that could be included in the definition of this crime. Other delegations expressed the view that the resolution did not contain a definition for the purpose of individual criminal responsibility; or indicate the acts that were of sufficient gravity for this purpose; or address a number of fundamental issues that could arise in criminal proceedings, including questions relating to exceptional situations involving the lawful use of force; or deal with possible defences, including self-defence.

33. Some delegations suggested that it might be easier to reach agreement on a general definition of aggression similar to the new Draft Code provision proposed by the ILC. Other delegations expressed a preference for a general definition accompanied by an enumeration of acts to ensure respect for the principle of legality and made reference to the General Assembly resolution and the Siracusa draft. Still other delegations believed it was not necessary to define aggression even if the court had jurisdiction. Some delegations which had recommended that no definition of aggression should be included in the statute proposed that a provision should be inserted which specified that, in accordance with the provisions of the Charter, the Security Council would determine whether or not a situation could be considered aggression. The role of the court would then be to establish whether or not that situation had given rise to the commission of crimes involving individual responsibility. On the role of the Security Council in relation to the crime of aggression, some delegations pointed out the need to avoid a situation in which the use of the veto in the Security Council might preclude the prosecution of a person by the court for the commission of such a crime.

4. Article 20, subparagraph (c) - Serious violations of the laws and customs applicable in armed conflict

(a) Inclusion

34. There was general agreement that serious violations of the laws and customs applicable in armed conflict could qualify for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble.

35. Some delegations expressed the view that this category of crimes should be limited to exceptionally serious violations of international concern; to violations of fundamental protections or particularly serious acts which shocked the conscience of humanity; to situations in which national jurisdiction was unavailable or ineffective to ensure respect for the principle of complementarity and to avoid undermining the existing obligations of States to prosecute or extradite offenders; and to extremely serious situations in which the national courts refused, failed or were unable to exercise jurisdiction given the primary responsibility and interest of a State in maintaining military discipline.

36. Other delegations expressed the view that it was sufficient to refer to serious violations, that the reference to exceptionally serious violations could give rise to confusion regarding a third category of crimes especially regarding grave breaches, that grave breaches were by definition serious offences, that any attempt to distinguish between grave breaches would be inconsistent with the obligation to prosecute or extradite, that the seriousness criterion was more appropriate for distinguishing between violations of the laws and customs applicable in armed conflict which varied in gravity and that issues relating to national court jurisdiction should be addressed elsewhere.

37. There were proposals to include a seriousness criterion in the definition, to apply the criterion in listing the offences to obviate the need for a judicial determination or to include a general provision that would apply to all crimes.

(b) Character of the armed conflict

38. There were different views as to whether this category of crimes should include violations committed in international or non-international armed conflicts. Some delegations expressed the view that it was important to include violations committed in internal armed conflicts given their increasing frequency in recent years, that national criminal justice systems were less likely to be able to adequately address such violations and that individuals could be held criminally responsible for such violations as a matter of international law, with references being made to the Statute of the Rwanda Tribunal and the decision of the Yugoslavia Tribunal Appeals Chamber in the *Tadić* case. Other delegations expressed the view that violations committed in internal armed conflicts should not be included, that the inclusion of such violations was unrealistic and could undermine the universal or widespread acceptance of the court, that individual criminal responsibility for such violations was not clearly established as a matter of existing law with attention being drawn to the absence of criminal offence or enforcement

provisions in Additional Protocol II, and that customary law had not changed in this respect since the Rwanda Tribunal Statute. Different views were also expressed concerning the direct applicability of the law of armed conflict to individuals in contrast to States.

(c) Definition

39. Reference was made to various relevant instruments, including the Nürnberg Tribunal Charter, the Yugoslavia Tribunal Statute, the Rwanda Tribunal Statute, the Draft Code of Crimes and the new definition proposed by the ILC Special Rapporteur on the Draft Code.

40. Several delegations expressed the view that grave breaches of the Geneva Conventions had attained the status of customary law and should be combined with other serious violations of the laws and customs applicable in armed conflict under subparagraph (c), with attention being drawn to the new definition proposed for the Draft Code in contrast to the Yugoslavia Tribunal Statute and a proposal being made to amend the title of this category of crimes accordingly.

41. Several delegations expressed the view that the list of offences should include sufficiently serious violations of the Hague law, with references being made to the 1907 Hague Convention IV respecting the Laws and Customs of War on Land and its annexed regulations and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; grave breaches of the Geneva Conventions, with references also being made to common article 3 thereof and grave breaches of Additional Protocol I; and comparably serious violations of other relevant conventions that had attained the status of customary law. Different views were expressed concerning the customary law status of Additional Protocols I and II. There were proposals to incorporate provisions of the protocols without referring thereto and to add Additional Protocol II under article 20, subparagraph (e). The view was also expressed that Additional Protocol I had not so far secured the most widespread acceptance by the international community, which would be essential for the Protocol to qualify for inclusion in the statute.

5. Article 20, subparagraph (d) - Crimes against humanity

(a) Inclusion

42. There was general agreement that crimes against humanity met the jurisdictional standard referred to in the second paragraph of the preamble.

(b) Definition

43. Several delegations noted the absence of a generally accepted definition of crimes against humanity under treaty law. Reference was however made to such relevant instruments as the Nürnberg Tribunal Charter, Control Council Law Number 10, the Tokyo Tribunal Charter, the Yugoslavia Tribunal Statute, the Rwanda Tribunal Statute, the Draft Code of Crimes against the Peace and Security of Mankind, the new definition proposed by the Special Rapporteur on the Draft Code and the Siracusa draft. The view was also expressed that the definition of

crimes against humanity should only be dealt with upon completion of the International Law Commission's work on the Draft Code.

(c) General criteria

44. A number of delegations attributed particular importance to the general criteria for crimes against humanity to distinguish such crimes from ordinary crimes under national law and to avoid interference with national court jurisdiction with respect to the latter, with the discussion focusing primarily on the criteria contained in article 3 of the Rwanda Tribunal Statute.

(d) Widespread or systematic criteria

45. There was general support for the widespread or systematic criteria to indicate the scale and magnitude of the offences. The following were also mentioned as elements to be taken into account: an element of planning, policy, conspiracy or organization; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts committed as part of a policy, plan, conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes. Some delegations expressed the view that this criterion could be further clarified by referring to widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law; acts committed systematically or as part of a public policy against a segment of the civilian population; acts committed in application of a concerted plan to indicate the necessary degree of intent, concert or planning; acts committed with the consent of a Government or of a party in control of territory; and exceptionally serious crimes of international concern to exclude minor offences, as in article 20, paragraph (e). Some delegations expressed the view that the criteria should be cumulative rather than alternative.

(e) Attack against any civilian population

46. A number of delegations emphasized that crimes against humanity could be committed against any civilian population, in contrast to the traditional notion of war crimes. However, some delegations expressed the view that the phrase "attack against any civilian population" which appeared in the Rwanda Tribunal Statute was vague, unnecessary and confusing since the reference to attack could be interpreted as referring to situations involving an armed conflict and the term "civilian" was often used in international humanitarian law and was unnecessary in the current context. There were proposals to delete this phrase or to replace the word "attack" by the word "acts". However, the view was also expressed that the word "attack" was intended to indicate some use of force rather than an armed attack and a number of delegations believed that the phrase should be retained to avoid significantly changing the existing definition of these crimes.

(f) Motivation or grounds

47. There were different views concerning the general motivational requirement or grounds criterion contained in the Rwanda Tribunal Statute. The view was

expressed that it would be useful to include these grounds to demonstrate the types of situations in which crimes against humanity were committed, as indicated by the recent events in the former Yugoslavia and in Rwanda which had led to the establishment of the ad hoc tribunals. However, other delegations expressed the view that the inclusion of such a criterion would complicate the task of the prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element; that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups; that it was important to include crimes against such groups since the definition of genocide might not be expanded to cover them; and that the criterion was not required under customary law, with attention being drawn to the Yugoslavia Tribunal Statute and the Draft Code. There was a proposal to include a general reference to the commission of the crimes on discriminatory grounds.

(g) Nexus to armed conflict

48. There were different views as to whether it was necessary to include a nexus to an armed conflict which was not included in the Rwanda Tribunal Statute. Some delegations expressed the view that crimes against humanity were invariably committed in situations involving some type of armed conflict, as indicated by the ad hoc tribunals; that existing law required some type of connection to an armed conflict in a broad sense, with references being made to the Nürnberg Charter, the Yugoslavia Tribunal Statute, the memorandum of its President and the Nikolić case pending before it; and that customary law had not changed owing to the adoption of human rights instruments which provided specific procedures for addressing violations or the Rwanda Tribunal Statute.

49. However, several delegations expressed the view that crimes against humanity could occur in time of armed conflict or in time of peace and that the armed conflict nexus that appeared in the Nürnberg Tribunal Charter was no longer required under existing law, with attention being drawn to article I of the Genocide Convention, Control Council Law Number 10, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Rwanda Tribunal Statute, the Yugoslavia Tribunal Appeals Chamber decision in the Tadić case and the Draft Code. The view was also expressed that although crimes against humanity often occurred in situations involving armed conflict, these crimes could also occur in time of peace or in situations that were ambiguous.

50. The view was expressed that peacetime offences might require an additional international dimension or criterion to indicate the crimes that would be appropriate for adjudication by the court, possibly by limiting the individuals who could commit such crimes. Some delegations questioned the need for an additional criterion assuming that sufficiently serious, grave or inhumane acts were committed on a widespread and systematic basis, with attention being drawn to proposals for clarifying this general criterion to indicate more clearly the offences that would be appropriate for international adjudication.

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(h) List of acts

51. Several delegations expressed the view that the definition should include a list of exceptionally serious, grave or inhumane acts which shocked the conscience of humanity. Some delegations expressed the view that these acts could be drawn from the identical list contained in the Yugoslavia and Rwanda Tribunal statutes, with some delegations indicating provisions that might require further consideration or clarification.

(i) Murder

52. Some delegations expressed the view that murder required further clarification given the divergences in national criminal laws. There were proposals to refer to wilful killing or to murder, including killings done by knowingly creating conditions likely to cause death.

(ii) Extermination

53. The view was expressed that extermination should be deleted as a duplication of murder or clarified to distinguish between the two, with a proposal being made to refer to alternative offences.

(iii) Enslavement

54. Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts.

(iv) Deportation

55. Some delegations expressed the view that deportation required further clarification to exclude lawful deportation under national and international law. There were proposals to refer to discriminatory and arbitrary deportation in violation of international legal norms; deportation targeting individuals as members of a particular ethnic group; deportation without due process of law; deportation or unlawful confinement of civilian population; or deportation resulting in death or serious bodily injury.

(v) Imprisonment

56. Some delegations expressed the view that this offence required further clarification to exclude lawful imprisonment in the exercise of State authority. There were proposals to refer to imprisonment in violation of due process or judicial guarantees; imprisonment in violation of international norms prohibiting arbitrary arrest and detention; and imprisonment resulting in death or serious bodily injury.

(vi) Torture

57. Some delegations expressed the view that this offence required further clarification. There was a proposal to incorporate relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment without requiring that the acts be committed by a public official if the other general criteria were met. There was also a proposal to define this offence in terms of cruel treatment, including torture, and to add mutilation as a separate offence.

(vii) Rape

58. There were proposals to refer to rape committed on national or religious grounds; rape, other serious assaults of a sexual nature, such as forced impregnation; or outrages upon person dignity, in particular humiliating and degrading treatment, rape or enforced prostitution, with attention being drawn to recent acts committed as part of a campaign of ethnic cleansing.

(viii) Persecution on political, racial and religious grounds

59. Some delegations expressed the view that persecution should be further clarified and limited to the most egregious cases, while other delegations questioned whether it met the jurisdictional standard and whether it constituted a general policy criterion or a separate offence. These other delegations did not consider it appropriate to include persecution within the jurisdiction of the court. There was a proposal to include persecution on political, racial, religious or cultural grounds. Reference was also made to the Siracusa draft.

(ix) Other inhumane acts

60. Some delegations favoured the inclusion of this category to cover similar acts that were not envisaged and might not be foreseeable; to enable the prosecution of individuals for similar inhumane acts that were not explicitly listed, as in the case of the Yugoslavia Tribunal; and to facilitate the expansion of the court's jurisdiction in response to the continuing development of international law, with attention being drawn to similar language contained in various definitions of crimes against humanity and national criminal laws.

61. Other delegations expressed the view that this category should not be included as it would not provide the clarity and precision required by the principle of legality, would not provide the necessary certainty concerning the crimes that would be subject to international prosecution and adjudication, would not sufficiently guarantee the rights of the accused and would place an onerous burden on the court to develop the law.

62. There were proposals to limit this category by interpreting it in the context of the definition as a whole, or by referring to other inhumane acts of a similar nature; or by referring to other similar inhumane acts accompanied by a description of their general characteristics and specific examples. There were also proposals to prepare an exhaustive list by adding similar acts that constituted serious violations of the laws and customs applicable in armed conflict or grave breaches of the Geneva Conventions, such as taking civilians

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as hostages, wilfully depriving a civilian of the right to a fair and regular trial, wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property carried out unlawfully and wantonly. The view was expressed that the double criminality of such acts would not be inconsistent with the principle of legality since the court would decide the preponderant elements of an act in determining individual criminal responsibility. The view was also expressed that the statute could provide an amendment or review procedure that would enable the States parties to the statute to add other offences at a later stage.

6. Article 20, subparagraph (e) - Treaty-based crimes

(a) Inclusion

63. Several delegations expressed the view that the jurisdiction of the court should be limited to the core crimes under general international law to avoid any question of individual criminal responsibility resulting from a State not being a party to the relevant legal instrument, to facilitate the acceptance of the jurisdiction of the court by States that were not parties to particular treaties, to facilitate the functioning of the court by obviating the need for complex State consent requirements or jurisdictional mechanisms for different categories of crimes, to avoid overburdening the limited financial and personnel resources of the court or trivializing its role and functions, and to avoid jeopardizing the general acceptance of the court or delaying its establishment.

64. Some delegations expressed support for including various treaty-based crimes which, having regard to the conduct alleged, constituted exceptionally serious crimes of international concern as envisaged in article 20, paragraph (e). The importance of the principle of complementarity was emphasized with respect to these crimes.

65. Some delegations favoured including a separate mechanism for referring exceptional cases where all the interested States concerned agreed. Such a mechanism would involve a separate State consent regime from that applicable to crimes in respect of which universal jurisdiction already existed.

(b) International terrorism

66. A number of delegations were of the view that international terrorism qualified for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble given the serious nature of such acts which shocked the conscience of humanity and the magnitude of the consequences thereof in terms of human suffering and property damage, the increasing frequency of international terrorist acts committed on an unprecedented scale, the resulting threat to international peace and security indicated by recent Security Council practice and the concern of the international community indicated by the condemnation of those crimes in numerous resolutions and declarations. The view was expressed that including those crimes in the court's jurisdiction would strengthen the ability of the international community to combat those crimes, give States the option of referring cases to the court in exceptional situations and avoid jurisdictional disputes between States. The view was also expressed

that the court might consider cases of international terrorism in exceptionally serious cases when the question was referred to the court for consideration by the Security Council. Some delegations also emphasized the importance of distinguishing between international terrorism and the right to self-determination, freedom and independence of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes or other forms of alien domination. References were made to the relevant treaties listed in the annex to the draft statute, the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly at its forty-ninth session 4/ and the Draft Code. The view was expressed that it was precisely these crimes of international terrorism in respect of which in many cases national jurisdiction would not be available.

67. A number of other delegations were of the view that international terrorism should not be included because there was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the court; these crimes were often similar to common crimes under national law in contrast to the crimes listed in other subparagraphs of article 20; the inclusion of these crimes would impose a substantial burden on the court and significantly increase its costs while detracting from the other core crimes; these crimes could be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements for reasons similar to those relating to illicit drug trafficking; and the inclusion of the crimes could lessen the resolve of States to conduct national investigations and prosecutions and politicize the functions of the court.

(c) Apartheid

68. Some delegations favoured including apartheid and other forms of racial discrimination as defined in the relevant conventions.

(d) Torture

69. Some delegations expressed support for the inclusion of torture and referred to the definition contained in the relevant international legal instruments. The view was also expressed that torture was a crime under the domestic law of States and should not be included.

(e) Hostages

70. The view was expressed that the inclusion of the Hostages Convention must be considered.

(f) Illicit drug trafficking

71. Some delegations expressed the view that particularly serious drug trafficking offences which involved an international dimension should be included, that these offences had serious consequences on the world population and that there was no unified system for addressing these crimes because of divergences in national laws. Reference was made to the convention listed in the annex to the ILC draft statute as well as the new definition proposed by the ILC Special Rapporteur.

72. The view was expressed that drug trafficking should not be included because these crimes were not of the same nature as those listed in other paragraphs of article 20 and were of such a quantity as to flood the court; the court would not have the necessary resources to conduct the lengthy and complex investigations required to prosecute the crimes; the investigation of the crimes often involved highly sensitive information and confidential strategies; and the crimes could be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements.

(g) Attacks against United Nations and associated personnel

73. Some delegations expressed the view that special consideration should be given to including violations referred to in the Convention on the Safety of United Nations and Associated Personnel since they were undoubtedly exceptionally serious crimes of international concern; the attacks were committed against persons who represented the international community and protected its interests; the attacks were in effect directed or committed against the international community; United Nations and associated personnel were usually involved in situations in which the national law-enforcement or criminal justice system was not fully functional or capable of addressing these crimes; and the international community had a special responsibility to ensure the prosecution and punishment of these crimes. There were different views as to whether and to what extent these violations constituted crimes under general international law which could be included in the jurisdiction of the court prior to the entry into force of the Convention.

(h) Serious threats to the environment

74. The view was expressed that the inclusion of serious threats to the environment must be considered.

(i) Review procedure

75. Some delegations favoured limiting the initial jurisdiction of the court and including a review procedure for considering the addition of other crimes at a later stage to avoid delaying the establishment of the court and to take account of the adoption or entry into force of relevant treaties in the future. A number of delegations presented a proposal to this effect, reproduced in annex V to the present summary. Others were not in favour of the inclusion of such a procedure since there was no point in delaying decision-making. There were different views concerning the effectiveness of review procedure clauses. The consideration of this question was described as premature. The view was expressed that treaties adopted after the establishment of the court could include appropriate jurisdictional clauses similar to those relating to the International Court of Justice.

B. General principles of criminal law

76. The discussion of the Preparatory Committee followed the guidelines set out in annex II to the report of the Ad Hoc Committee on the Establishment of an International Criminal Court 5/ on the question of the general principles of criminal law.

1. Process issues

(a) Methods of elaboration

77. There was broad agreement that the fundamental principles of criminal law to be applied to the crimes punishable under the statute should be clearly laid down in the statute in accordance with the principle of legality, nullum crimen sine lege, nulla poena sine lege. It was noted that conventions defining international crimes provided only one aspect of the substantive criminal law; they usually did not contain principles of liability and defence and other general rules of criminal law to be used to apply the definitions of crimes. It was considered important, therefore, that all general elements of crimes and the basic principles of liability and defence should be elaborated by States and laid down in the statute itself, or in an annex thereto which would have the same legal value as the statute. Suggestions were also made that punishment to be imposed on each offence, including the enforcement of penalties, should be elaborated in the statute. The view was widely shared that the elaboration of those essential elements and principles, if left to the court to deal with on a case-by-case basis, would not ensure predictability or equality before and in the law. Some delegations, however, suggested that technical and detailed rules should be developed by judges of the court and incorporated in the rules of the court, subject to the approval of the States parties to the statute.

78. The articulation of the fundamental principles of criminal law in the statute was considered consistent with the prerogative of legislative powers of sovereign States. It would give potential States parties a clear understanding of the obligations entailed. It would also provide clear guidance to the court and promote consistent jurisprudence. Furthermore, it would ensure predictability and certainty in the application of law, which would be essential for the protection of the right of the accused.

79. Several delegations, however, cautioned against the risk of compounding the statute with extensive and detailed rules. The goal, it was said, should not be to replicate an exhaustive criminal code in the statute. It was recognized that the statute could not specify all rules, nor could it predict all types of issues which might come before the court. It was suggested, therefore, that a proper balance must be struck between the statute laying down basic rules of applicable law and the rules of the court supplementing and further elaborating those basic rules for the effective functioning of the court. In this connection, it was also suggested to take into account the fact that the jurisdiction of the court might be limited only to certain core crimes, and that the role of the court would be complementary to that of national courts when addressing the issues of the statute or the rules, or the application by the court of general principles of criminal law.

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80. It was emphasized by some delegations that the concept of an international criminal court with universal jurisdiction would be sustainable only on the basis of a flexible and concise statute. The more detailed the statute, it was said, the more difficult would be the problem of reconciling the existing different legal systems. The statement of law in the "general part" of the statute, therefore, should reflect a common and balanced approach drawing on all the major legal systems of the world.

81. It was proposed that, in order to achieve a concise and flexible document, the statute should provide for a mechanism or include a general mandating clause whereby the judges of the court would elaborate the elements of the crimes set out in article 20 as well as the principles of liability and defence that were not otherwise set out in the statute. Any rules to be elaborated by the judges would be of a subsidiary nature, conforming to the elements and principles laid down in the statute. It was also proposed that the court should be allowed to draw on the major legal systems of the world to establish general principles of criminal law, the application of which would be subject to the approval of the States parties to the statute. Some delegations were of the view, however, that conferring the substantive legislative power upon the judges of the court would not be consistent with the principle of legality.

82. Furthermore, a number of delegations suggested that, in order to satisfy the requirements of fairness, transparency, consistency and equality in criminal proceedings, not only the fundamental principles of criminal law, but also the general and most important rules of procedure and evidence should be articulated in the statute. It was also suggested that the principle of procedural legality and its legal consequences should be firmly established in the statute itself. It was further stressed that the procedural rules of the court should be determined not on the basis of which system of law was to be applied but rather by reference to the rules of law that would be more appropriate to ensure justice.

83. The view was generally expressed that the method used for the statutes of the International Tribunal for the former Yugoslavia and of the International Tribunal for Rwanda which left to the judges to elaborate and adopt substantive rules of procedure and evidence was not an appropriate model for the elaboration of such rules for a permanent court to be established on a consensual basis by States parties to its statute. At the same time, the relevance of certain specific provisions contained in their statutes, particularly those relating to individual criminal responsibility, was noted by a number of delegations. Some delegations also drew attention, in this regard, to the relevant provisions contained in the Draft Code of Crimes being prepared by the International Law Commission. The issue of rules of procedure will be discussed in detail during the August session of the Committee.

(b) Relevance of national law

84. The direct application of national law provided in article 33, paragraph (c), of the draft statute was viewed with concern by a number of delegations. It was remarked that, in view of the divergences in national criminal laws, and in the absence of precise rules in the provisions of article 33 as to which national law should be applied, a direct referral to

national law would lead to inequality of treatment of the suspect and the accused in criminal proceedings and inconsistent jurisprudence. Some delegations considered that a certain residual role of national law should be recognized, bearing in mind that international law did not yet contain a complete system of substantive criminal law. Recourse to national law should be made only as a last resort, failing the application of the statute, the relevant treaties and the principles and rules of general international law, and only to the extent that the rules of national law in question were consistent with the statute. It was also suggested that the court should apply national law concerning general rules of criminal law which were not addressed in the statute and that the statute should clearly determine which national law should be applied in each specific case. The view was also expressed that the proper applicable law would be the law of the State where the crime was committed but other national laws might also be applied if considered fit by the court under the circumstances of the case. It was also stated that the court should take into account general principles of criminal law that were common to the major legal systems, rather than relying on the national law of a particular State to resolve issues in particular cases, which were not addressed in the statute or the rules of the court. The suggestion was also made that the reference to national law should be allowed for general rules of criminal law only and, as far as procedural rules were concerned, the statute and the rules of the court should be the exclusive sources of applicable law.

85. As regards the specific provisions contained in the draft statute relevant to the general rules of criminal law, the provisions of article 33 concerning applicable law were considered vague and should be revised by:
(a) substantiating in more detail the sources of the substantive law the court would apply; and (b) elaborating the essential elements of the general principles of criminal law, including the principles of liability and defence. Several specific proposals to this effect were submitted by delegations. It was also suggested that the primacy of the statute and the order of relevance and applicability of other sources of applicable law should be made explicit in the revision of the article.

2. Substantive issues

(a) Non-retroactivity

86. The principle of non-retroactivity was considered fundamental to any criminal legal system. A number of delegations recognized the substantive link between this concept and article 39 of the statute of the court (nullum crimen sine lege) and suggested that this principle should be clearly and concisely set out in the statute, even though some of the crimes referred to in the draft statute were recognized as crimes under customary international law. It was further noted that the principle nulla poena sine lege also required that the principle of non-retroactivity be clearly spelled out in the statute and that the temporal jurisdiction of the court be limited to those crimes committed after the entry into force of the statute.

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(b) Punishment under customary international criminal law

87. The view was expressed that the principle of legality required not only clear definitions of the crimes under the jurisdiction of the court which should be set out in the statute, or in an annex thereto, but also a clear and full statement of the related punishment so as to avoid problems often associated with the issue of punishment under the different legal systems. Doubts were however expressed by some delegations as to whether customary international law covered the issue of punishment in relation to individuals held responsible for their acts or omissions.

(c) Individual criminal responsibility

88. It was generally accepted that the concept of individual criminal responsibility for the crimes, including those acts of planning, instigating and assisting the person who actually committed the crime, was essential and should be stipulated in the statute. Some delegations suggested, therefore, that a provision laying down the basic elements of the responsibility should be included in the statute itself. Reference was made to articles 7 and 6, respectively, of the Yugoslavia and Rwanda Tribunal statutes. Other delegations were of the opinion that such an explicit and elaborate provision was not needed, as it could lead to complex negotiations, a lengthy statute and a difficult task of defining such elements as participation, conspiracy and complicity.

89. The view was also expressed that an essential question which should be addressed in the statute was whether or not some kind of safeguard provision was needed to ensure that individual criminal responsibility did not absolve the State of any of its responsibility in a given case.

(d) Irrelevance of official position

90. Taking into account the precedents of the Nürnberg, Tokyo, Yugoslavia and Rwanda tribunals, there was support for the statute to disallow any plea of official position as Head of State or Government or as a responsible government official; such official position should not relieve an accused of criminal responsibility. Some delegations thought that this issue could be included in relation to "defences". The opinion was also expressed that further consideration would be useful on the question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the court.

(e) Criminal liability of corporations

91. Some delegations held the view that it would be more useful to focus attention on individual responsibility, noting at the same time that corporations were in fact controlled by individuals. Several delegations stated that such liability ran counter to their domestic law. The point was made, however, that the liability of a corporation could be important in the context of restitution. It was recalled that the principle had been applied in the Nürnberg Judgement.

(f) Appropriateness of statute of limitations

92. Some delegations were of the view that, owing to the serious nature of the crimes to be dealt with by the court, there should be no statute of limitations for such crimes. On the other hand, some delegations felt that such a provision was mandatory and should be included in the statute, to ensure fairness for the accused. The view was expressed that statutory limitation might apply to crimes that are relatively less serious than that of genocide or crimes against humanity.

93. In the view of some delegations, this question should be considered in connection with the issue of the availability of sufficient evidence for a fair trial. Some delegations suggested that instead of establishing a rigid rule the Prosecutor or President should be given flexible power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. In this connection, it was noted that article 27 of the statute was relevant to this issue. It was suggested that an accused should be allowed to apply to the court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years.

(g) Actus reus

94. The general view was that a provision on the objective elements of omissions should be established to set out clearly and carefully in the statute all conditions under which a crime could be committed, and that this should not be left to the discretion of the court, especially when considering that it would be placed in a difficult position to make a choice of the different rules in the various national legal systems. Some delegations were of the view that it would not be necessary to include such a provision; that it would be sufficient to have the definition of the crimes in the statute.

95. Regarding the element of causation, several delegations were of the view that it was not necessary to include causation in the statute, as it was largely a factual matter which the court itself could consider and decide upon. Still other delegations felt it was preferable to include rules on causation and accountability.

(h) Mens rea

96. A general view was that since there could be no criminal responsibility unless mens rea was proven, an explicit provision, setting out all the elements involved, should be included in the statute. There was no need, however, to distinguish between general and specific intention, because any specific intent should be included as one of the elements of the definition of the crime.

97. Regarding recklessness and gross negligence, there were differing views as to whether these elements should be included. Motives were seen as being relevant at the penalty stage of the proceedings. There were also doubts expressed concerning the appropriateness of including these elements in the Statute.

98. The need for including a provision setting an age limit at which an individual could be regarded as not having the requisite mens rea was widely supported. The question of at what age, however, would require common agreement. There was support for various proposals to this effect, including one that would give the court discretion to evaluate an offender - within a certain age range - as to his or her maturity at the time of the commission of the crime. Attention was also drawn to a number of international instruments relevant to this issue, including the Convention on the Rights of the Child.

(i) Other types of responsibility

99. The view was expressed that such types of responsibility as solicitation, attempt, conspiracy, aiding and abetting, accessory after the fact, complicity and responsibility of superiors for acts of subordinates were also important and relevant to the task of the Preparatory Committee and, according to some delegations, they should be defined in the statute. Several delegations stressed the need to resolve these issues in the statute having regard to the different meanings and definitions used in national laws.

100. As to the definitions themselves, the opinion was expressed that the terms of incitement would have to be carefully worded so as to avoid any violations of the right of free speech. Regarding the crime of attempt, it was stated that something more than mere preparation was needed to qualify as an attempt; another suggested definition was one where the perpetrator had commenced the crime but failed to complete it. Concerning aiding and abetting and conspiracy, some delegations stressed that a formula acceptable to all would have to be found before inclusion in the statute. The issue of the responsibility of superiors for acts of subordinates was viewed as critical, and should be defined for inclusion in the statute. It was further suggested that responsibility of superiors, in this regard, also might be relevant to the question of a defence. Reference was made to provisions of the Statutes of the Tribunals of the former Yugoslavia and Rwanda.

(j) Defences

101. Some delegations stated that they were still formulating their position on this issue. It was generally felt, however, that it was necessary to set out the fundamental elements of defences, and, some delegations stated that the definitions contained in the Siracusa draft provided a good starting-point. Concern was expressed over adopting a too generalized approach, particularly involving war crimes where specific defences already had been developed. The view was expressed that the list of defences should not be exhaustive given the difficulty of trying to cover every conceivable defence, while others believed that leaving to the court the power to add other defences would be tantamount to giving legislative power to the court. It was also generally felt that only defences relevant to the type of crimes under the statute should be included. Accordingly, it was suggested, for example, that intoxication and insanity did not have to be included in the statute. A proposal was made to add renunciation to the list of defences.

102. The view was expressed that it was not necessary to refer to mistake of law or fact as it was, to a large extent, a question of common sense. In other

words, if a particular negation existed, then, of course, mens rea did not exist. Some delegations found it necessary that such provisions should be made, and further submitted concrete proposals (see annex II).

103. The opinion was expressed that self-defence should also include defence of others, as well as the concept of pre-emptive self-defence. The latter was particularly important to military situations where it would be justifiable to act pre-emptively in response to an imminent threat of force. It was also suggested that the concept of proportionality should be inserted in the definition of self-defence.

104. Several delegations were of the view that defence of property was not needed because of the type of crimes over which the court would have jurisdiction, but the point was made that it would be relevant in cases of certain war crimes.

105. Attention was drawn to the need to avoid an overlap between superior orders, and necessity and duress in the statute, and specific language, therefore, would be required in defining these terms, especially considering the subtle distinction between necessity and duress. Doubt was expressed over the need to include the law-enforcement defence.

106. Some delegations stated that they were still in the process of defining their positions on defences under public international law. Doubt was expressed over grouping together military necessity, reprisals and Article 51 of the Charter of the United Nations, and concern was also expressed over the inclusion of reprisals under defences.

107. The view was expressed that because many legal systems included the elements of aggravating and mitigating circumstances, these issues would need to be addressed in the statute. The remark was made that perhaps they should be dealt with in connection with penalties.

(k) Penalties

108. It was generally stated that if the court was to have jurisdiction over crimes, then it would have to impose penalties on individuals found guilty of those crimes. Whether specific penalties should be written in the Statute and, if not, what law applied in this regard would have to be discussed; article 47 of the draft statute offered a solution. The remark was also made that under paragraph 2 of article 47, preference was given to the law of the State where the crime had been committed. It was suggested that the issues relating to penalties, as well as aggravating and mitigating circumstances, should be discussed fully at the resumed session of the Preparatory Committee under procedural questions.

C. Complementarity

1. General comments

109. It was observed that complementarity, as referred to in the third paragraph of the preamble of the draft statute, was to reflect the jurisdictional relationship between the international criminal court and national authorities, including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of States. Different views were expressed on how, where, to what extent and with what emphasis complementarity should be reflected in the statute.

110. Some delegations felt that complementarity should more explicitly reflect the intention of the Commission, in respect of the role of an international criminal court, in order to provide clear guidance for interpretation. That intention was for such a court to operate in cases where there was no prospect of persons, who had been accused of the crimes listed in the statute, being duly tried in national courts; but such a court was not intended to exclude the existing jurisdiction of national courts or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements. The Commission's intention, it was further noted, applied not only to national decisions as to whether or not to prosecute, but also to decisions by national authorities to seek assistance, including extradition, from another State and decisions by such other State to cooperate accordingly, particularly where that State was under an international obligation to do so. In this regard, therefore, complementarity becomes a constant in the arrangements for the court and needs to be taken into account at each point at which the respective roles of the court and national authorities can or do coincide. From this perspective, it is not a question of the court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character. There may be instances where the court could obtain jurisdiction quickly over a case because no good faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case. But as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the court's jurisdiction should not come into operation. A view was also expressed that a possible safeguard against sham trials could also be for the statute to set out certain basic conditions relating to investigations, trials and the handling of requests for extradition and legal assistance.

111. It was also observed that the limited resources of the court should not be exhausted by taking up prosecution of cases which could easily and effectively be dealt with by national courts. In addition, taking into account that under international law, exercise of police power and penal law is a prerogative of States, the jurisdiction of the court should be viewed only as an exception to such State prerogative.

112. Some delegations expressed the view that the establishment of the court did not, by any means, diminish the responsibility of States to vigorously investigate and prosecute criminal cases. Therefore, they wanted the preamble of the statute to reiterate the obligation of States in this respect. Caution,

however, was voiced against placing such a paragraph in the preamble because, it was felt, it might tilt the bias in favour of national jurisdiction in interpreting complementarity. According to this view, the establishment of such a court was itself a manifestation of States exercising their obligations to prosecute vigorously perpetrators of serious crimes.

113. Some other delegations expressed concern that without specifying clear exceptions to the concept, complementarity would render the court meaningless by undermining its authority. In their view, a suggestion that in each and every case the prosecutor had to prove that circumstances required the court's intervention would reduce it to a mere residual institution, short of necessary status and independence. In this context it was noted that while national authorities and courts had the primary responsibility for prosecuting the perpetrators of the crimes listed in the statute, the court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law. While attempts should be made to minimize the risk of the court dealing with a matter that could eventually be dealt with adequately on the national level, it was, according to this view, still preferable to the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities. In addition, a concern was raised that complementarity should not be used to uphold the sanctity of national courts. Such an approach would shift the emphasis from what the court can do to what the court should not do. Some delegations proposed the inclusion of a reference to complementarity in article 1; the proposal received some support.

114. The remark was also made that complementarity was closer to the concept of concurrent jurisdiction. The jurisdiction of the court, it was stated, should be looked at in different contexts. While, for certain crimes, the court would have inherent jurisdiction, the primary jurisdiction of national courts would be more appropriate for other crimes. The remark was further made that in respect of core crimes, there would always be a "perception" problem: it would be difficult to believe that national courts could be fair and impartial. For other types of crimes, such as terrorism, drug trafficking, etc., this would not be a problem. In addition, it was noted that, in cases of inherent jurisdiction, complementarity should not be construed so as to make the court's jurisdiction dependent on factors beyond the court's control. However, it was noted, even in respect of core crimes, the important role of national courts should not be undermined. Reference was made to the recent practice with respect to the establishment of ad hoc tribunals whereby the tribunals exercise inherent and primary jurisdiction over certain individual cases, with some deference to national justice systems as they currently exist.

2. Third preambular paragraph

115. A number of delegations agreed that while the preambular reference to complementarity should remain, a more explicit definition of the concept, enumerating its constituent elements, should also be embodied in an article of the statute. In this context it was noted that the words "unavailable" or "ineffective" should be further defined; it was also suggested that the words be omitted altogether. Suggestions were also made to replace the words "trial

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procedures" with "systems" for further clarity. It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective" was too subjective. Such a determination would place the court in the position of passing judgement on the penal system of a State. That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the court.

116. As regards who is to decide on whether the court should exercise jurisdiction, three views emerged. According to one view, taking into account that the exercise of penal jurisdiction was the prerogative of States, the court's jurisdiction was an exception to be exercised only by State consent. An optional clause regime, according to this view, was consistent with this approach. According to another view, the court itself should make the final determination of jurisdiction, but in accordance with precise criteria set out in the statute. According to yet a third view, while agreeing that the court should decide on its own jurisdiction in accordance with the statute, the statute should leave some discretion to the court.

117. It was recommended that the consequences of a State's refusal to consent to the court's jurisdiction, if required by the statute, should also be examined. The question would be whether, in such cases, the State would entail such responsibility as existed in the classical international law of State responsibility, or whether different consequences would ensue which should be specified in the statute itself.

3. Article 35

118. It was noted that the principle of complementarity involved besides the third preambular paragraph, a number of articles of the statute, central among which was article 35 on admissibility. Several delegations felt that the three grounds indicated in that article, on the basis of which the court may decide that a case before it is inadmissible seemed too narrow. Paragraph (a) refers, for example, only to decisions of a State not to proceed to a prosecution, ignoring other national decisions to discontinue the proceedings, acquit, convict of a lesser offence, sentence or pardon or even requests for mutual assistance or extradition. Moreover, it was observed that other grounds of inadmissibility contained in other articles of the statute (for example articles 42 and 55) could be included in article 35 which would then constitute the main article on complementarity in the operative part of the statute. The view was expressed that the article should be expanded to include cases which are being or have been prosecuted before national jurisdictions, subject to qualifications in respect of impartiality, diligent prosecution etc. It was further noted that the court should abstain from exercising jurisdiction unless no domestic court was properly fulfilling this responsibility.

119. It was observed that paragraph (b) of article 35 indicated a crime under investigation as a ground for inadmissibility without taking into account the circumstances under which a crime was investigated and the possibilities of ineffective or unavailable procedures or even sham trials. A view was expressed to allow for parallel investigations to be conducted by national authorities and

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the court, under certain circumstances, as for example, when an interested State did not object for the court to investigate other aspects of the same conflict. It was generally agreed that "parallel" procedures between national courts and the court should be avoided to the extent possible. The necessity of additional procedural checks and review was also stressed particularly in cases where the procedure of article 36 was applicable.

120. Other delegations recalled again the difficulties in assessing when procedures were ineffective and pointed out the essentially subjective character of the proposed criteria. It was felt that more stringent and objective criteria, possibly included in the text of the statute itself, would be needed for the purposes of greater clarity and security. Efficiency of national proceedings (as juxtaposed to the intention to "shield" the accused) was one such criterion: several delegations noted that notions such as "absence of good faith" and "unconscionable delay" in the conduct of the proceeding on the part of national authorities would be useful tools on the clarification of this issue. However, other delegations felt that these terms were also vague and might be confusing.

121. On the subject of who may raise the issue of inadmissibility, the question was raised as to whether the accused should be permitted to file an application or this right should rest only with "interested States". It was, however, noted that the notion "interested States" should be further defined. In this context several suggestions were made, notably mentioning the State of which the accused is a national, the State(s) of which the victim or victims are nationals, the State which has custody of the accused, the State on the territory of which the alleged crime was committed (State of locus delicti) or any other State which could exercise jurisdiction in respect of the crime. It was also pointed out that in such a case, article 36 would have to be modified to include any "interested State" in this sense. Other delegations noted that any State could have the right to file such a request. A view was also expressed that the accused could bring a challenge only after indictment and only on specific grounds.

122. As for the time of raising the issue of admissibility, it was generally agreed that it should be prior to, or at the beginning of the trial and not later. The view was expressed that the court should be able to declare, at any time and of its own motion, or upon the request of the accused, a case inadmissible. In this respect, it was also noted that the court should retain the right to recommence proceedings after a fundamental change of circumstances, or to review its own decision on the admissibility of a case.

123. Concerning the non-gravity of the crime as a ground for inadmissibility, it was pointed out that, the inclusion of more detailed definition of crimes in article 20, would suffice to indicate that the crime did not pertain to the jurisdiction of the court as defined in the same article 20.

4. Article 42

124. As regards article 42, the remark was made that, the principle of non bis in idem was closely linked with the issue of complementarity. This paragraph it was noted should apply only to res judicata and not to proceedings discontinued for technical reasons. In addition, non bis in idem should not be construed in such a way as to permit criminals to escape any procedure.

125. Some delegations felt that the term "ordinary crime" in paragraph 2 (a) of article 42 of the draft needed further clarification. Some others thought that the term was sufficiently clear and should be retained. Yet some other delegations considered that it could be left out altogether since it might create a certain confusion. In this connection, it was mentioned that the principle non bis in idem could apply when a person has already been tried for only a part of a crime. The view was also expressed that it was the nature of the crimes that was significant and this should be taken into consideration for the distinction between "ordinary crimes" and "other crimes" falling under the jurisdiction of the court. It was suggested that a formulation to the effect that the national proceedings did not take account of the international character and the grave nature of the act might be useful.

126. Concerning the other precondition for the court to try a person already tried in another court, indicated in paragraph 2 (b) of article 42, many delegations voiced their concern on the vagueness and the subjectivity of the criteria. It was pointed out that several core crimes could not effectively be tried in national courts because of their very nature and the circumstances of their commission. Several delegations felt that this wording would grant the court an excessive right of control over national jurisdictions and would even undermine the principle of complementarity. According to this view, the court should not be considered as an appellate court. However, several other delegations considered the article as drafted by the Commission sufficiently clear and comprehensive.

127. A view was also expressed that article 42 should include cases where the sentence imposed by the national jurisdiction was manifestly inadequate for the offence as an exception to non bis in idem. It was, however, noted that a possible solution would be to provide for the court to try a person already tried in another court, only if the proceedings in the other court manifestly intended to shield the accused from his/her international criminal responsibility.

128. The view was also expressed that the "exception" to the principle non bis in idem as set out in article 42 (b) should extend beyond the trial proceedings, to embrace parole, pardon, amnesty, etc. Others pointed out that the conditions and modalities laid down in article 35 should also apply to article 42. It was further noted that both articles 35 and 42 could be consolidated in order to constitute a unique central article on complementarity in the operative part of the statute. The view was also expressed on the possibility of a preliminary hearing on the question of admissibility between any interested State and the court. The view was further expressed that article 42 (b) should not include any wording which could be conducive to subjective interpretation.

5. Article 27

129. It was noted that the decision of the prosecutor not to prosecute should be subject to subsequent revision if, for example, new evidence appeared or a new complaint lodged by a State. The view was also expressed that the prosecutor should examine ex officio, on receiving a complaint, the question of inadmissibility of the case.

130. Moreover, in a case where the prosecutor defers investigation since a State is proceeding with a national investigation, a mechanism of mutual information between the prosecutor, the investigating and the complainant States should be established. This mechanism would allow for the complainant State to lodge further complaints with the court, should the third State's investigation be inadequate. The view was also expressed that in such a case a new complaint would not be required. In the same context, other delegations expressed their concern on the powers of the prosecutor to conduct investigations under article 26 and the possibility that they be in conflict with domestic judicial procedures. 6/ According to a number of delegations, however, the provisions of articles 26 and 27 reflected adequately the issue of complementarity and avoided the risk of "double jeopardy".

6. Article 51

131. As concerns article 51 which imposes an obligation on States to cooperate with the court in connection with its investigations and proceedings, it was observed that this obligation should be confined to cases which are not inadmissible. Other delegations felt that the obligation should not be limited but embrace all aspects of cooperation even for the determination of grounds of inadmissibility.

7. Article 53

132. A view was expressed that paragraph 4 of article 53 of the statute which gives priority to court requests among possibly completing extradition obligations, should be deleted in the context of a strict application of the complementarity. Another view pointed out however, that the provision was satisfactory and did not really affect complementarity in so far as the case had not been declared inadmissible.

D. Trigger mechanism

133. The trigger mechanism touches upon two main clusters of issues: acceptance of the court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction (arts. 21 and 22); and who can trigger the system and the role of the prosecutor (arts. 23 and 25).

1. Acceptance of the court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction: articles 21 and 22

134. Some delegations felt that the treatment of jurisdiction in articles 21 and 22 of the statute was insufficient. In their view, the inherent jurisdiction of the court should not be limited to genocide, but should extend to all the core crimes. Acceptance of inherent jurisdiction for the core crimes would require significant revision of articles 21 and 22. From this perspective, the court would not need specific State consent to establish its jurisdiction. States, by virtue of becoming party to the statute, would be consenting to its jurisdiction. This meaning of inherent jurisdiction, some delegations felt, was fully compatible with respect for State sovereignty, since States would have expressed their consent at the time of ratification of the statute as opposed to having to express it in respect of every single crime listed in the statute at different stages. Hence, there would be no need for a selective "opt in" or "opt out" approach. In accord with this view, the opening clause of article 21 should be changed to state that the court should have jurisdiction over the crimes listed in article 20. Article 22 would become superfluous and should be deleted. It was, however, noted that if the statute were to include crimes other than core crimes, the "opt in" regime could be maintained for them. In this regard, a remark was made that a distinction should be made between the jurisdiction of the court per se and the exercise of that jurisdiction or the terms and conditions for the exercise of jurisdiction; these issues all linked to the question of admissibility under article 35. In this context, a comment was made that article 21 dealt with the conditions of the exercise of jurisdiction by the court, by establishing the court's jurisdiction ratione personae.

135. Some delegations found inherent jurisdiction to be a contradiction in terms, for the jurisdiction of the court would arise exclusively out of the contractual stipulations in the instrument by which the court would be created. They also found inherent jurisdiction incompatible with complementarity. Other delegations saw it differently. For them, the concept of inherent jurisdiction meant that the court was invested with jurisdiction by virtue of its constituent instrument, with no need for additional consent to exercise its jurisdiction. Inherent jurisdiction also did not, in their view, imply that the court, in all circumstances, had a better claim than national courts to exercise jurisdiction. It was therefore possible that a case could arise in relation to a crime which was within the court's inherent jurisdiction but which would none the less be tried by a national jurisdiction, because it was determined that the exercise of national jurisdiction would be more appropriate in that particular case.

136. Some other delegations expressed reservations about the inherent jurisdiction of the court over any crime, including the core crimes. They believed that the regime of "opt in" provided for in article 22 was more likely to maximize universal participation. In their view, this approach was also consistent with the principle of sovereignty and the regimes set out by the treaties on the core crimes themselves. A comment was made that the "opt in" approach was compatible with the practice of adherence to the jurisdiction of the International Court of Justice. Similarly, in the current context, by becoming party to the statute of the court, States did not automatically accept

the jurisdiction of the court in a particular case. This would be done by means of a declaration, in accordance with article 22 of the statute.

137. Some delegations saw merit in having genocide come under the inherent jurisdiction of the court. Reference was made to article VI of the Genocide Convention, which provides that persons accused of genocide should be tried by a competent tribunal or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction. However, a view was expressed that taking into account that the Genocide Convention contained provisions on national jurisdiction and the number of States parties to it was less than 120, the inclusion of genocide as a crime within the so-called inherent jurisdiction of the court would not only undermine the relevant provisions of the Genocide Convention on national jurisdiction, but would also run the risk of discouraging the non-States parties to that Convention from signing the statute.

138. It was noted that the question of acceptance of the court's jurisdiction was inextricably linked to the question of pre-conditions for the exercise of that jurisdiction, or consent, as well as to the question of who might bring complaints. In this connection, a comment was made that the jurisdiction of the court, even under the core crimes approach, embraced different categories of crimes of different degrees of seriousness required for bringing charges. For example, the threshold for establishing genocide was rather high, compared to many war crimes which were not as high. However, not every single war crime was of sufficient serious international concern to warrant its submission to the court.

139. Some delegations supported the requirement, set out in article 21 (1) (b), calling for the consent of the custodial State and the State where the crime was committed. In their view, such a consent requirement was essential, since the court could not function without the cooperation of these States. A comment was made that custody over a suspect, however, should be in accordance with international law; the maxim male captus, bene detentus should have no application to the jurisdiction of the court. It was further stated that, as a general rule, the number of States whose consent was required should be kept to the minimum. Otherwise, the likelihood of one of these States not being party to the statute would increase, precluding the court from initiating proceedings.

140. The remark was made that the word "custody" in article 21 (1) (b) (i) was misleading, for it appeared to include mere presence, even a transitory presence. This was inconsistent with current State practice, according to which an accused is normally located in or extradited to the State in which he or she committed the crime. Furthermore, in current State practice, the potential for political abuse was controlled in a number of ways, including comity and diplomatic immunity. In contrast, the current draft, according to this view, left open significant possibilities for efforts by States to embroil the court in legal controversies and political disputes, which could undermine its effectiveness.

141. In addition, it was noted that the actual location of the accused was not important at the initial stage of the proceedings, but only at the stage of arrest. Hence, the role of the custodial State should be addressed in

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connection with the obligation to cooperate with the court, and not in connection with jurisdiction. Even in that context, it sufficed, according to this view, for the custodial State to be party to the statute; it was not necessary for it to have accepted a particular type of jurisdiction.

142. A view was expressed that the precondition to the exercise of the court's jurisdiction imposed by article 21 (1) (b) (i) was not consistent with subsequent provisions in the statute, namely those that allowed the court to confirm an indictment against a person who was not detained and article 53 (2) (b) and (c).

143. As regards the requirement of consent of the State where the crime was committed, a comment was made suggesting modifying the language of article 21 (1) (b) (ii) by means of the addition of the words "if applicable" in order to cover situations where the crime might have been committed outside the territory of any State, such as on the high seas.

144. It was also stated that in certain types of conflict, in order to determine the States whose consent were necessary for the proceedings of the court, one should look at the whole situation and not just the State where the crime was committed. The example given was war crimes, where at least two States would have interests in the case and the State where the war crime was committed could be the one that started the war in violation of international law. Going beyond the core crimes, to terrorism, for example, it was noted that there would be other States, such as the one which was the target of the crime, with a real interest in the proceedings, yet whose interests were not taken into account by the current draft. It was further stated that a large number of States were precluded by their domestic law from extraditing their nationals for criminal prosecution abroad. The view was also expressed that the consent of the State of nationality of the accused to the jurisdiction of the court should also be a precondition to the exercise of that jurisdiction. The reasons for that suggestion are set out in paragraph 105 of the report of the Ad Hoc Committee. 2/ Alternatively, the State of nationality of the suspect would have to extradite only if it refused to commence prosecution, in good faith, within a reasonable period of time. This approach, according to this view, was compatible with the principle of universal jurisdiction and should be taken into account in the statute.

145. It was also noted that the court could not exercise jurisdiction in relation to States not party to the statute. This, it was agreed, could become a particularly difficult issue, when the State not party, was the custodial State or its cooperation was indispensable to the prosecution. For this reason, some delegations were of the view that it would be proper for the Security Council to have a role respectful of the independence of the court in humanitarian situations.

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2. Who can trigger the system and the role of the prosecutor: articles 23 and 25

(a) The Security Council: article 23

146. Delegates in their comments appeared to agree that the statute would not affect the role of the Security Council as prescribed in the Charter of the United Nations. The Council would, therefore, continue to exercise primary authority to determine and respond to threats to and breaches of the peace and to acts of aggression; the obligation of Member States to accept and carry out the decisions of the Council under Article 25 of the Charter would remain unchanged. However, some delegations voiced three concerns: first, that it was important, in the design of the statute, to ensure that the international system of dispute resolution - and in particular the role of the Security Council - would not be undermined; secondly, that the statute should not confer any more authority on the Security Council than that already assigned to it by the Charter; and thirdly, that the relationship between the court and Council should not undermine the judicial independence and integrity of the court or the sovereign equality of States.

147. In the light of the above concerns, some delegations found that article 23 was completely unacceptable and should be deleted. Others felt it was in need of substantial revision precisely because it conferred more authority on the Security Council than did the Charter or than was necessary in contemporary international relations; it also diminished the requisite judicial independence of the court. In their view, the Security Council was a political organ whose primary concern was the maintenance of peace and security, resolving disputes between States and having sufficient effective power to implement its decisions. The Council made its decisions, according to these delegations, taking into account political considerations. The court, in contrast, was a judicial body, concerned only with the criminal responsibility of individuals who committed serious crimes deeply offensive to any moral sense.

148. Some other delegations, however, favoured the proposed article 23 of the statute. In their view, the article corresponded with the role for the Security Council carved out in the Charter and properly took account of the current situation of international relations. They did not agree with the view that decisions of the Security Council were exclusively political in nature. They were convinced that, while it was a political organ, the Security Council made decisions in accordance with the Charter of the United Nations and international law and these decisions, in particular, those adopted under Chapter VII of the Charter, had legal or political-legal character. On the contrary, according to this view, it was more likely for a State to lodge a complaint with the court inspired purely by political motives.

(i) Article 23 (1)

149. Some delegations asked for the deletion of article 23 (1), empowering the Security Council to refer a "matter" to the court. Others favoured its retention. For the former delegations, a referral by the Security Council would affect the independence of the court in the administration of justice. Delegations holding this view believed that a political body should not

determine whether a judicial body should act. In addition, referral by the Security Council would dispense with the requirements of article 21 as well as complementarity and the sovereign equality of States. It was further noted that article 23 (1) assigned the right of referral of a matter to the court only to the Security Council. Taking into account current efforts to define the new world order, in which the relationship between the Security Council and the General Assembly had come under scrutiny, these delegations wondered if such right should also be conferred upon the General Assembly.

150 Those delegations favouring the retention of article 23 (1) based their views on the following: the Security Council had already demonstrated a capacity to address the core humanitarian law crimes through the creation of two ad hoc tribunals for the former Yugoslavia and for Rwanda and had created the International Commission of Inquiry for Burundi to report on violations of international humanitarian law; one of the purposes of the court was to obviate the creation of ad hoc tribunals. In this context, the Council's referral should activate a mandatory jurisdiction, similar to the powers of the ad hoc tribunals. The Council's referral would not, according to these delegations, impair the independence of the court, because the Prosecutor would be free to decide whether there was sufficient evidence to indict a particular individual for a crime.

151. It was also noted that article 23 (1) limited the Security Council's referral authority to Chapter VII situations. Some delegations proposed that the Council's referral authority should be extended to matters under Chapter VI as well. They mentioned Articles 33 and 36 of the Charter, which encourage Council action of a peaceful character with respect to any dispute, the continuance of which was likely to endanger the maintenance of international peace and security. One of the "appropriate procedures" described, it was noted, was "judicial settlement". Those pressing this point suggested deleting "Chapter VII of" from article 23 (1) so that Chapter VI actions would also be covered. Some other delegations did not favour the extension of the Council's right of referral to Chapter VI, while some other delegations reserved their position on this issue.

152. As regards the use of the word "matter" in article 23 (1), a suggestion was made to replace it with "case". The suggestion was also made to provide that any referral should be accompanied by such supporting documentation as was available to the Security Council. This modification of article 23, according to this latter suggestion, would impose on the Council the same burdens and responsibilities imposed on a complainant State. A number of delegations, while not disagreeing with the latter, did not agree with the proposal to change the word "matter" to "case". They held the view that the Council, while having the power to refer a situation to the court, should not be able to refer an individual to the court. The word "situation" was however considered too broad by some delegations.

(ii) Article 23 (2)

153. With respect to the requirement of article 23 (2) that the Security Council should have determined that an act of aggression had already been committed before the court could process complaints on individual responsibility for an

act of aggression, two different views were expressed. According to one view, the paragraph should be retained if aggression was going to be included in the list of crimes in the statute. According to another view, paragraph 2 should be deleted even if aggression was included in the list of crimes in the statute. Some delegations reserved their position pending a final decision on the inclusion of aggression in the list of crimes.

154. A number of delegations recalled their opposition to the inclusion of the crime of aggression in the list of crimes in the statute (for their views, see para. 28 above) and observed that if aggression were excluded from the list of crimes, there would be no need to maintain article 23 (2). But article 23 (2) would be indispensable if aggression were included in the list. They referred to Article 39 of the Charter, according to which the Security Council has the exclusive power to determine whether an act of aggression has been committed. In their view, it was difficult to see how an individual could be charged with an act of aggression - assuming a definition for individual culpability were agreed upon - without the threshold requirement of an act of aggression first being determined by the Security Council.

155. Delegations that favoured the deletion of article 23 (2), while supporting the retention of aggression as a crime under the statute, based their view on the following grounds. First, in practice, the Security Council often responded to situations under Chapter VII of the Charter without explicitly determining the existence of an act of aggression; requiring such a determination for the exercise of jurisdiction by the court could impede the effective functioning of the court. Secondly, because of the veto power, the Council might be unable to characterize an act as aggression. Thirdly, the Council's determination of an act of aggression was based on political considerations, while the court would have to establish criminal culpability on legal grounds. In this connection and to protect the prerogatives of the Council, it was suggested that a provision should be included to the effect that the statute was without prejudice to the functions of the Security Council under Chapter VII. However, a view was expressed that the determination by the Security Council on the existence of an act of aggression should be binding on the deliberation of the court. Yet another view was expressed that article 23 (2) could remain in place if supplemented by a provision clarifying that the decisions by the Security Council on the commission of an act of aggression by a State is not binding on the court as regards the question of individual responsibility.

(iii) Article 23 (3)

156. As regards article 23 (3), providing that no prosecution may be commenced arising from a situation being dealt with by the Security Council in accordance with Chapter VII unless the Council otherwise decides, a number of different views were expressed.

157. According to one view, the necessity for the retention of the paragraph arose from the fact that the Security Council had the primary responsibility for the maintenance of international peace and security. Delegations expressing this view thought it would be unacceptable if the court were empowered to act in defiance of the Charter of the United Nations and to interfere in delicate matters under consideration by the Security Council. According to this view,

paragraph 3 should be revised to include, not only Chapter VII situations, but all situations which were being dealt with by the Council.

158. According to another view, because paragraph 3 was designed to function as the political equivalent of the sub judice rule, its ambit was so wide as to infringe on the judicial independence of the court. Reference was made to the large number of situations currently under consideration by the Security Council and the fact that in many cases the Security Council had been "seized" of these same situations continuously for more than 30 years without taking effective action. It was noted that, under paragraph 3, the Council would have the authority to preclude the court from examining any complaint in respect of them. It was further noted that the Statute of the International Court of Justice did not prevent the Court from hearing cases relating to international peace and security which were being dealt with concurrently by the Security Council. According to this view, paragraph 3 should therefore be deleted.

159. Yet another view, while concerned about the implication of paragraph 3 for the judicial independence of the court, found some ground for a safeguard clause, but not as currently formulated. According to this view, the words "being dealt with" should be narrowly defined to limit their scope. A narrow interpretation of these words was found compatible with the intention of the Commission as explained in its commentary to the paragraph which interpreted it to mean "a situation in respect of which Chapter VII action is actually being taken" by the Security Council. Even this interpretation, according to this view, left many questions unresolved; for example, the words "threat to or breach of the peace" were open to broad interpretation and could conceivably cover all cases likely to fall within the court's jurisdiction. Considering that national courts could prosecute a case relating to a situation under consideration by the Security Council, the reasonableness of denying the court the same power as national courts was questioned. It was proposed to include a provision stating that "should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation". The purpose of this proposal was to allow the court to take action in situations where the Security Council, though seized of a matter, would not or could not act upon it. A suggestion was also made to change the emphasis in the paragraph, by allowing the court to proceed with a complaint unless the Security Council took a formal decision in accordance with Article 27 of the Charter to ask the court not to proceed on the basis that the Security Council was taking effective action in relation to that situation or a matter referred to the Security Council as a threat to or breach of the peace. This would avoid the veto being available in respect of the court's jurisdiction.

160. Concern was voiced about the possibility of conflict between decisions by the court and the Security Council on the same issue. There was a feeling that those concerns were not adequately dealt with in the current wording of article 23.

(b) States: article 25

161. It was observed that the complaint mechanism set out in article 25 was premised on the right of any State party, under certain conditions, to lodge a complaint with the Prosecutor alleging that a crime "appears to have been committed". Some delegations found this arrangement satisfactory. Others, for different reasons, felt it needed substantial modification.

162. Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for, this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer "situations" to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 (1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation.

163. Some delegations felt that only those States parties to the statute with an interest in the case should be able to lodge a complaint. Interested States were identified as the custodial State, the State where the crime was committed, the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime. Some other delegations opined that the crimes under the statute were, by their nature, of concern to the international community as a whole. They also noted that the jurisdiction of the court would only be engaged if some Government failed to fulfil its obligations to prosecute an international crime; then, in their view, all States parties would become interested parties. Some delegations felt that articles 34, 35 and 36 of the statute provided adequate safeguards against abuse. In addition to preventing political abuse of the process, they suggested that the Prosecutor notify all other States parties to the statute, allowing them the opportunity to express their views on whether to proceed with the case before the court decided. Some delegations proposed that one could require more than one State to lodge a complaint in order to signify that a serious crime of interest to the international community is at issue.

164. Some other delegations were of the view that the States which could lodge a complaint not only should be party to the statute, but should also have accepted the court's jurisdiction in respect of the specific crime for which the State had made a complaint. In this respect, it was noted that for the crime of genocide a complaint could be made to the court by a State party to the Genocide Convention but not party to the statute. In other words, the acceptance requirements of articles 21 (1) and 25 (2) would be circumvented.

(c) Prosecutor

165. Some delegations found the role of the Prosecutor, under article 25, too restricted. In their view, States or the Security Council, for a variety of political reasons, would be unlikely to lodge a complaint. The Prosecutor should therefore be empowered to initiate investigations *ex officio* or on the basis of information obtained from any source. It was noted that the

Prosecutors of the two existing ad hoc tribunals were granted such rights; there was no reason to deny the same power to the Prosecutor of this court. Hence the suggestion to add a new paragraph to article 25 along the line of article 18 (1) of the Statute of the Tribunal for the former Yugoslavia and article 17 (1) of the Statute of the Tribunal for Rwanda. Under this system, therefore, individuals would also be able to lodge complaints.

166. In order to prevent any abuse of the process by any of the triggering parties, a procedure was proposed requiring that in case a complaint was lodged by a State or an individual or initiated by the Prosecutor, the Prosecutor would first have to satisfy himself or herself that a prima facie case against an individual obtained and the requirements of admissibility had been satisfied. The Prosecutor would then have to present the matter to a chamber of the court (which would not ultimately try the case) and inform all interested States so that they would have the opportunity to participate in the proceedings. In this respect the indictment chamber was considered as the appropriate chamber. The chamber, upon a hearing, would decide whether the matter should be pursued by the Prosecutor or the case should be dropped. Up to this point, the procedure would be in camera and confidential, thus preventing any publicity about the case and protecting the interest of the States.

167. Some other delegations could not agree with the notion of an independent power for the Prosecutor to institute a proceedings before the court. In their view, such an independent power would lead to politicization of the court and allegations that the Prosecutor had acted for political motives. This would undermine the credibility of the court. This power could also lead to overwhelming the limited resources of the Prosecutor with frivolous complaints. A view was expressed that the complaint lodged by the Prosecutor on his or her own initiative lacking the support of the complainant State would be ineffective. A view was further expressed that developments in international law had yet to reach a stage where the international community as a whole was prepared to empower the Prosecutor to initiate investigations. It was unrealistic to seek to expand the Prosecutor's role, according to this view, if widespread acceptance of the court was to be achieved.

(d) Other comments

168. Two other comments were made in respect of article 25. First, preconditions to the exercise of jurisdiction should be looked at and satisfied at the very beginning and before the stage of investigation, lest the court invest substantial resources only to discover that it could not exercise jurisdiction. Secondly, some delegations felt that article 25 on complaint was too complicated and would make the exercise of the jurisdiction of the court unpredictable.

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E. Cooperation between States and the international criminal court

1. General issues relating to States' cooperation with the court

169. The view was widely shared that since the proposed international criminal court would not have its own investigative or enforcement agencies, the effectiveness of the court would depend largely upon the cooperation of national jurisdiction in obtaining evidence and securing the presence of accused persons before it. It was considered essential, therefore, that the statute provide the court with a sound, workable and predictable framework to secure the cooperation of States. There was the position that the legal framework governing cooperation between States and the court should be broadly similar to that existing between States on the basis of extradition and legal assistance agreements. This approach would ensure that the framework of cooperation would be set forth explicitly and the procedure in which each State would meet its obligations would be controlled by its national law, although there would be instances in which a State must amend its national law in order to be able to meet those obligations. There was also the position, however, that the statute should provide for an entirely new regime which would not draw upon existing extradition and legal assistance conventions, since the system of cooperation between the court and States was fundamentally different from that between States and extradition existed only between sovereign States. The obligation imposed by the statute on States parties to cooperate would not prevent the application of national laws in implementing such cooperation.

170. The principle of complementarity was considered particularly important in defining the relationship and cooperation between the court and States. It was suggested that the principle called for the establishment of a flexible system of cooperation which would allow for special constitutional requirements of States, as well as their obligations under existing treaties.

171. It was noted that the nature and scope of cooperation were closely linked with the basic issue of the jurisdiction of the court under article 20 of the statute, and with such other issues as admissibility, consent mechanisms and the choice between "opt in" and "opt out" systems.

172. There was general support for the view that all basic elements of the required cooperation between the court and States should be laid down explicitly in the statute itself, while the list of such elements need not be exhaustive. It was suggested that a State would need to have a clear understanding of the types of assistance required to qualify their obligations in accordance with its domestic law, or to make provisions in their law for specific forms of assistance to be available.

173. As regards the question of the extent to which national law should be a source for determining the obligations of States under the statute, the view was expressed that since the statute was to provide all basic requirements of cooperation between States parties and the court, national law should not be regarded as a source for determining such requirements, although the importance of its role in implementing the cooperation required by the statute should be

emphasized. It was noted further that, in order for the system of cooperation to be workable, there must be some deference to national law, but it could not be so dependent on national law that there would be real doubts about the extent to which States would provide meaningful cooperation of the court in appropriate circumstances. The view was expressed by some delegations that matters of substance should be governed by the statute and matters of procedure by national law.

174. Concerning the issue of the extent to which States parties to the statute would be bound to grant assistance and cooperation to the court, it was suggested that the obligations of States should be clearly and exhaustively defined in the statute, as well as the exception to that obligation. The suggestion was also made that the statute itself should stipulate that in general a request of the court was mandatory. The view was expressed, however, that the obligation could not be absolute, as inferred from the principle of complementarity. It was furthermore suggested that, if the jurisdiction of the court was to be limited to the core crimes, there should be no need for acceptance of its jurisdiction by the State to cooperate, and some kind of safeguard should be provided to enable the court to take further action should the State fail to comply with the court's request. Some delegations also stated, however, that if jurisdiction was not limited to core crimes those States that had not accepted jurisdiction over a crime might not be obligated to cooperate. The view was expressed that precise mechanisms should be provided for situations where a State party refused to honour the Court's requests, and for cooperation with non-parties. Recourse to the Security Council in some cases was mentioned.

175. It was generally felt that the grounds for refusing compliance with requests from the court should be limited to a minimum, taking into account the special character of the jurisdiction of the court and the seriousness of the crimes to be covered under the statute. Some exceptions referred to by delegations included deference to the principle of complementarity, urgency to exercise national jurisdiction, non-acceptance of the jurisdiction of the court by the requested State, competing requests received by the requested State from the court and from another State under existing treaty arrangements and constitutionally protected rights. The view was expressed by some delegations that essential security interests of the requested State should also qualify for refusal. As regards traditional exceptions to extradition, many of them, such as lack of dual criminality, political offence and nationality, were considered inappropriate in the light of the type of crimes to be dealt with by the court. The view was expressed that such traditional exceptions to extradition had their merits in this context.

176. It was noted that the relation between the obligations under parts 7 and 8 of the draft statute and existing conventions between States in the same area raised a particularly difficult problem. The point was made that the principle of complementarity would suggest that the requested State had the discretionary power to make a determination as to which request should have priority in the interest, for example, of effective prosecution. On the other hand, some delegations insisted on the primacy of requests from the court, which would be established by an international convention and whose jurisdiction would be limited to core crimes, in the case where a State party had received competing

requests from the court and from another State party. The situations involving a competing request by a State non-party to the statute was considered particularly complex and it was suggested that the matter should be further examined.

177. It was noted that further discussions would be required to consider situations where the national authority of a State party did not exist for the court to establish contact to seek cooperation.

178. The question was raised as to what would be the effect of the court's exercise of inherent jurisdiction where the State requested to grant cooperation denied such cooperation without a justifiable reason. It was further stated that under the existing norms of international law, the State that did not comply with the obligations of the statute would be held in violation of international law, which would impose State responsibility upon that State.

2. Apprehension and surrender

179. It was noted that the system of apprehension and surrender under article 53 of the draft statute, which embodied a strict transfer scheme without contemplating any significant role of the national courts and other authorities on this matter, was a departure from the traditional regime of cooperation between States established under the existing extradition treaties. In this regard, some delegations expressed their view in favour of a system based exclusively on the traditional extradition regime, modified as necessary. Some other delegations supported the transfer regime as envisaged in the statute. Some further delegations expressed their view in support of reconciling the two regimes to ensure the consistent application of the statute. The suggestion was made also that, in order to facilitate its acceptance by States, the statute should provide for a choice between a modified extradition regime and a strict transfer regime, subject to different national laws and practices. It was, however, emphasized that whatever might be its character, it was a unique system of cooperation, which must be tailored to the special needs of the court, taking into account national constitutional requirements, particularly those for guaranteeing the protection of the fundamental rights of individuals, and States' obligations under existing extradition treaties. It was further stated that the relationship between surrender and traditional extradition required further examination. The suggestion was made that the system of surrender should be extended to cover the convicted as well as the accused persons.

180. It was generally agreed that the basis for a request by the court for arrest of an accused as a preliminary measure for surrender should be a warrant of arrest issued by the international criminal court in accordance with the provisions of article 26 (3) of the draft statute. It was considered that such a request to a State party should contain a full description of the identity of the person sought, together with a full summary of the facts of the case in question, including details of the offence or offences of which the person was accused and a copy of a warrant for his arrest. Such information, it was said, should be provided at the time when the request was made, and not later as contemplated in article 57. In this regard, it was suggested that the statute should formulate a procedure for what is the traditional form of provisional

arrest whereby a request could be made in an abbreviated form in cases of urgency, to be followed by the transmission of a formal request for surrender accompanied by supporting documentation. As for the transmission of a formal request, it was suggested that, although some States might need to follow a modified extradition approach, rather than a pure transfer regime, documentary and evidenciary requirements under a modified extradition approach should be the least burdensome possible. In this connection, support was expressed for the proposal that States specify those requirements in advance at the time of their ratifying or acceding to the statute. On the question of the means of transmission, it was stated that the court should have the freedom of using in each case the channel and the method it deemed appropriate, including the use of new technology such as telefax.

181. The point was made that there should be a clear distinction between the court's request for pre-indictment arrest of a suspect and the court's provisional request for post-indictment arrest of an accused, pending the transmission of a formal arrest warrant. It was stated that, in either case, a warrant of arrest should be the basis for a request for arrest. Some delegations suggested that, if the warrant of arrest was issued in the pre-indictment stage, there should be a determination by national courts of some sufficiency of underlying evidenciary basis for the warrant and of the existence of a specific charge. A number of delegations felt, however, that there was no need to require the transmission of any evidence in support of the arrest warrant. Concern was expressed, however, that pre-indictment arrest was not permissible under certain constitutions, nor was the unusually long period of 90 days of the pre-indictment detention provided for in article 28 (2). As for a need for a provision in the statute concerning arrest of persons other than the accused, doubts were expressed as regards the possibility of the court's ordering the arrest and transfer of a reluctant witness. In this regard, it was considered preferable to ensure that the court itself had flexibility to receive testimony taken outside of its seat with the assistance of States or through, for example, electronic means.

182. On the question of the role of national authorities, in particular the judiciary, in the execution of the court's requests for provisional arrest, pre-surrender detention or surrender of the accused to the court, there was general support for the view that the statute should permit involvement of national courts in the application of national law where those requirements were considered as fundamental, especially to protect the rights of individuals, as well as to verify procedural legality. In this connection, the difficulties that many States would have with a direct enforcement of an arrest warrant issued by the court, as opposed to an indirect enforcement through available national mechanisms, were noted. It was suggested that, as a minimum, it should be possible to challenge in a national court of the requested State a document purporting to be a warrant - without the examination of the warrant in relation to substantive law - and that there should be a national forum in which to adjudicate upon any admissibility dispute, at least as regards double jeopardy. It was further suggested that issues of detention prior to surrender, including bail or provisional release, should be determined by national authorities and not by the international criminal court, as envisaged in the draft statute. It was considered necessary, however, that the requested State should ensure that the views of the Prosecutor in regard to any release of the suspect or the

accused should be brought to the attention of the judicial officer. In this regard, it was emphasized that there must be a very close working relationship between the Prosecutor and States parties in implementing the court's request for assistance and surrender, and that the statute should be sufficiently flexible so as to take this into account, while at the same time giving due attention to the rights of the individuals and the State's international obligations. The view was also expressed that the transfer of the accused to the court or to the detaining State could be an appropriate point for shifting the primary responsibility over the accused from the national authorities to the international criminal court. With regard to the question of who should execute surrender, it was suggested that, for practical reasons, the statute should provide for an option for execution by the custodial State, although there was also the view in favour of execution, in principle, by officials of the court only.

183. With regard to the question of exceptions to the obligation to surrender, the view was reiterated that they should be kept to a minimum and that they should be specifically laid down in the statute. In this connection, some delegations questioned the appropriateness of such traditional limitations or exceptions as the nationality of the accused, political or military offences, essential interests/ordre public or sufficiency of evidence. They also considered as inappropriate the principle of dual criminality, in view of the seriousness of crimes within the jurisdiction of the court. Other delegations felt that some of these elements should be taken into account in laying down exceptions. Suggestions for possible exceptions included the principle of non bis in idem, non-acceptance of the court's jurisdiction over a particular crime other than the crime of genocide, manifest errors of facts or law by the court, the lack of a prima facie case, the statute of limitations, pendency of national proceedings relating to the same crime and competing requests from the court and another State where the requested State might favour cooperation with that other State for effective prosecution of the crime, or might be obliged to render such cooperation to that other State.

184. On the rule of speciality, the view was expressed that, while some provision concerning speciality was required in order to safeguard the rights of the accused, the statute should provide for application only to offences committed before surrender and also for the possibility of waiver by the States concerned. It was further noted that the question of competing international obligations would arise in respect of apprehension or surrender where a person whom the requested State has secured from another State for offences unconnected with the court was transferred to the court without the consent of that State. The view was also expressed that the court should not, without the consent of the requested State, re-surrender to another State party or to a third State a person surrendered to it by the requested State in respect of offences committed before his surrender.

F. International cooperation and judicial assistance

1. Nature of assistance

185. While the term "judicial assistance" was described as sufficiently broad to cover the types of assistance envisaged, a preference was expressed for the term "mutual assistance" as a term of art used in recent legal instruments and as a more accurate description of the various types of assistance that might be required. A doubt was also expressed, however, concerning the appropriateness of the use of the term "mutual" considering the unique character of the court.

2. Obligation of States parties to provide assistance (article 51, paragraph 1)

186. Several delegations expressed the view that the statute should provide the legal basis for the obligation of States parties to provide the widest assistance to the court and the general framework that would govern such matters. It was suggested that States parties should be required to use their best efforts in responding without delay to requests for assistance.

187. Some delegations expressed the view that the obligation to provide assistance should apply to all States parties, while others suggested that it should apply only to States parties which have accepted the jurisdiction of the court with respect to the crime concerned. It was also suggested that requests for assistance should be made only after the court had determined the question of jurisdiction, including State consent requirements, and the question of admissibility under the principle of complementarity.

188. While noting differences between the assistance to be provided by States to the court and the traditional assistance provided between States in criminal matters, it was suggested that the statute should be guided by the relevant existing conventions and the United Nations Model Treaty on Mutual Assistance in Criminal Matters. The view was also expressed that the court could utilize existing arrangements for cooperation and mutual legal assistance in criminal matters.

3. Exceptions or limitations

189. The view was expressed that traditional exceptions to requests for assistance between States in criminal matters should not apply to the assistance to be provided to the court given the serious nature of the crimes and the interest of the international community in the effective investigation and prosecution of those crimes. It was emphasized that any exceptions should be expressly provided in the statute to provide predictability and uniformity with respect to the obligations of States parties, should be sufficiently narrow in scope to avoid abuse and should be kept to a minimum to avoid hampering the effective functioning of the court. The view was also expressed that States could indicate the applicable exceptions under national law when becoming a party to the statute. A question was raised as to whether the statute would provide a self-contained regime of obligations and exceptions. A question was

also raised as to whether the exceptions provided under international public law, such as reprisals or self-defence of States, would be applicable.

(a) National laws and constitutions

190. The view was expressed that national laws and constitutions should provide the procedures for implementing the requests for assistance but should not affect the obligation to provide such assistance under the statute. It was suggested that national law could also provide the basis for the compulsory nature of investigative actions taken by the national authorities, such as search and seizure orders.

(b) Public or national security interests

191. While the view was expressed that national security interests should constitute a valid exception as in existing conventions, concerns were expressed about recognizing a broad exception based on public or national security interests. It was suggested that consideration should be given to addressing the legitimate concerns of States regarding requests for information or evidence relating to national security interests or other sensitive information while limiting the possibility of abuse which could impede the effective functioning of the court.

(c) National investigation or prosecution

192. Some delegations expressed the view that the traditional exception to requests for assistance based on pending national investigations or prosecutions should not be applicable since the court would consider this matter in determining the admissibility of a case under the principle of complementarity as a preliminary matter. Other delegations expressed the view that consideration should be given to providing a limited exception in situations in which complying with a request for assistance would interfere with an effective national investigation or prosecution.

(d) Political or military offences

193. Many delegations expressed the view that the traditional exception concerning political or military offences should not apply to requests for assistance.

(e) Dual criminality

194. It was suggested that the dual criminality requirement should not be applied to requests for assistance by the court.

(f) Manifestly unfounded request

195. Some delegations expressed the view that a State party should be able to refuse to comply with a request for assistance which was manifestly unfounded.

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4. General provision or enumeration (article 51, paragraph 2)

196. A number of delegations expressed the view that the statute should contain a list of the types of assistance that might be requested of States parties to clearly indicate their obligations and to facilitate the adoption of implementing legislation. While several delegations favoured a non-exhaustive list to provide a measure of flexibility and to enable the court to request appropriate kinds of assistance in particular cases not specifically envisaged in the statute, other delegations favoured a comprehensive list to provide greater clarity concerning the obligation of States parties and thereby facilitate the enactment of implementing legislation. It was suggested that the list contained in article 51, paragraph 2, should be further elaborated based on existing instruments.

5. On-site investigations (article 26, paragraph 2 (c))

197. Several delegations expressed the view that the Prosecutor should not be authorized to unilaterally initiate and conduct on-site investigations in the territory of a State party without its consent since this authority would be contrary to the principle of State sovereignty; it would be difficult for the Prosecutor to conduct on-site investigations and to ensure compliance with divergent national and constitutional law guarantees of individual rights without the assistance of national authorities; and such authorization would go beyond existing international law and would not be generally acceptable to States.

198. The view was expressed that the on-site investigations envisaged under article 26, paragraph 2 (c), should be considered as a kind of assistance to be provided by States in response to an appropriate request from the court. It was emphasized that on-site investigations should be carried out only with the consent of the State concerned and by its competent national authorities in accordance with the national and constitutional law guarantees of individual rights. The view was expressed that there might be a limited exception to the State consent requirement in extraordinary situations involving the referral of a matter to the court by the Security Council under Chapter VII. Other delegations felt that the prosecutor should be authorized to carry out on-site investigations with the consent of the State concerned, and without its consent if the national authorities were unable to conduct an investigation that would meet the court's needs. In the view of those delegations, it would be up to the court to decide if that condition had been met.

6. Requests for assistance (article 57)

(a) Form and content of requests

199. Several delegations expressed the view that requests for assistance should include sufficiently detailed, relevant information concerning the crime, the alleged offender, the type of assistance requested, the reasons for requesting assistance and its objective as well as other relevant information depending on the type of assistance requested, such as the identity and location of the

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alleged offender, the identity and location of witnesses, the location of documents or other evidence. There was an indication of general satisfaction with article 57, paragraphs 3 and 4, while noting the possibility of further refinement based on the relevant instruments. It was suggested that it might be necessary to retain a degree of flexibility in view of divergent national law requirements.

(b) Competent authority for making such requests

200. The view was expressed that the Prosecutor should be competent to request assistance given his or her responsibility for the investigation and prosecution of alleged offenders. There were different views as to the extent to which the Prosecutor should be required to request the assistance of States in obtaining exculpating information and evidence or the defence should be permitted to request the assistance of States in this regard. The view was further expressed that the Presidency, the court or the Trial Chamber should also be competent to request assistance from a State party depending on the stage of the investigation or judicial proceeding. It was suggested that the court should be competent to request assistance either ex officio, upon the request of the Prosecutor, or the defence. It was also suggested that the Registry should be responsible for transmitting requests for assistance, as indicated in article 51, paragraph 2.

(c) Means of communication

201. Several delegations expressed the view that States parties should designate the competent national authority to receive requests for assistance to provide an expeditious and direct line of communication, as envisaged in article 57, paragraph 1. A preference was expressed for using diplomatic channels to communicate requests for assistance, while there was also an indication that this was not the current practice. It was suggested that there should be some flexibility to enable States parties to select different channels of communication.

202. In the view of some delegations modern means of communication should be used to facilitate expeditious communications, such as by fax or other electronic means. It was emphasized that it might be necessary to subsequently provide an original written request without delay to enable the national authorities to take appropriate action. However, concerns were expressed regarding the reliability and the confidentiality of such means.

7. Role of national authorities

203. It was emphasized that requests for assistance should be carried out by the competent national authorities in accordance with national law and constitutional guarantees of individual rights. It was also emphasized that it would be necessary for the national authorities to comply with relevant international standards in implementing the requests for assistance. It was suggested that the national authorities could carry out investigations pursuant to instructions provided by the court and that the Prosecutor or staff members could be present during the investigation and possibly participate therein.

8. Non-compliance

204. The view was expressed that consideration should be given to situations in which a State refused to assist in an investigation in an attempt to shield an individual from criminal responsibility or was unable to provide such assistance owing to the lack of an effective, functioning judicial or legal system. It was suggested that it might be possible to envisage a role for the Security Council in certain situations. It was also suggested that the statute should envisage a special chamber that would consider refusals or failures to comply with requests for assistance and render appropriate decisions.

9. Rule of speciality (article 55)

205. The view was expressed that the rule of speciality should apply to information or evidence transmitted to the court by a State. There was an indication of general satisfaction with the limited rule contained in article 55, paragraph 2. Emphasis was also placed on envisaging an exception to the rule based on the express consent or waiver given by the State that provided the information or evidence, with reference being made to article 55, paragraph 3. It was suggested that such an exception should be based on the consent or waiver of the accused. It was also suggested that the rule of speciality could be limited to situations in which the State concerned raised an objection.

10. Reciprocity

206. Some delegations were of the view that the rule of reciprocity should apply to the relation between the court and States, to the effect that the court should be under an obligation to comply with requests by States exercising jurisdiction in conformity with the notion of complementarity. The view was also expressed that the statute should merely envisage the possibility of the court providing information or evidence to a State to assist with a national investigation or prosecution of a similar or related case without overburdening the court. Although some delegations raised this issue under the term of reciprocity, other delegations pointed out that since the court would not be a State and could not be obligated to reciprocate assistance rendered by a State in a strict sense, it would be more appropriate to consider the issue as possible cooperation provided by the court to a State. It was further stated that a provision stipulating such cooperation by the court could be included in the statute. The view was expressed that the court could not provide information obtained from one State to another State without the consent of the former State.

11. Assistance of non-States parties (article 5)

207. The view was expressed that non-States parties should be encouraged to provide assistance to the court as envisaged in article 56. It was suggested that the court should be authorized to enter into special agreements or ad hoc

arrangements with non-States parties to encourage and enable such States to provide assistance to the court in general or in particular cases. It was also suggested that reciprocity or mutual cooperation might be an important factor in obtaining the assistance of non-States parties.

12. Recognition of judgements and enforcement of sentences

208. It was generally recognized that because this subject involved novel features and, therefore, only preliminary comments could be made at this stage, these issues would require further consideration and elaboration.

209. Concerning the issue of penalties, it was felt that penalties other than imprisonment, e.g., fines, restitution, compensation, may have to be considered under Part 8.

(a) Recognition of judgements (article 58)

210. The view was expressed that by accepting the jurisdiction of the court States parties would, by definition, recognize the court's judgements. Therefore, it was not necessary to provide for a particular recognition procedure in the statute. Article 58, therefore, should be modified to provide that a State should not only recognize a judgement of the court but also should enforce the court's sentences in its territory. The view was also expressed that States parties were bound to recognize the court's judgements upon the entry into force of the statute, and it was proposed that article 58 be amended by adding the sentence: "States parties have to recognize the judgements of the court as judgements rendered by their national judiciaries". It was further proposed that, as a consequence of the rule of reciprocity, a provision in article 58 should stipulate that the court also should recognize the judgements of the States parties.

211. Some delegations felt that automatic recognition of judgements and enforcement of sentences of the court should be subject to the provision that recognition should not be inconsistent with fundamental provisions of their domestic law.

212. A contrasting view envisaged the court as being on equal footing with national legal systems and that the court's judgements, therefore, should not be automatically recognized, but rather examined by the national court concerned.

213. There was support for both a method of continued enforcement and a national exequatur procedure. Regarding a national exequatur procedure, the point was made that the statute should ensure that the reasons for a State's refusal to execute the court's judgement were kept to an absolute minimum.

214. The need for article 58 was also questioned on the ground that if the court was to impose only imprisonment, vis-à-vis fines or restitution, then article 59 alone would appear to adequately specify a State's obligation to the court.

(b) Enforcement of sentences (article 59)

215. There was support among the delegations for the court to designate a State where the sentence of imprisonment would be served from a list of States which had indicated their "willingness" to accept convicted persons. The view was further expressed that in designating a State the court should take into account the interests of the court itself and of the State concerned as well as the fundamental rights of the prisoner. The remark was made, however, that article 59 should be redrafted so as to exclude any element of "willingness" on the part of States parties in executing the court's sentences, as this would run counter to the idea of the court being an extension of the judiciary of the States parties. In other words, article 59 should make it clear that States parties would be obligated to execute sentences of the court if they were so designated by the court.

216. Concerning the issue of the supervision of a sentence of imprisonment, it was generally agreed that the court should exercise control in critical areas, in order to ensure consistency and compliance with international norms regarding conditions of incarceration (e.g., the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners), and leaving to the custodial State the day-to-day supervision of the prisoner. The remark was also made that control by the court was necessary to prevent national law being used, for example, to reduce a sentence imposed by the court on a prisoner.

217. The point was also made that the issues of enforcement of sentences in article 59 and the issues of pardon, parole and commutation of sentences in article 60 merged to a certain extent, and that the temporary or permanent release of a convicted person should be decided upon by the court. It was recognized that that might require that some additional arm of the court be established to monitor when prisoners should be released.

(c) Pardon, parole and commutation of sentences (article 60)

218. The view was expressed that the issues of pardon, parole and commutation of sentences should be left to the court. Another view supported the retention of paragraph 4 of article 60 as an essential provision in the statute for a State's acceptance of prisoners.

219. There was also the view that since the court was a judicial body and should not be put in a position to consider extra-legal matters associated with pardons and parole, perhaps a separate entity should be created to deal with these issues.

220. Remarks, however, were made questioning the role of the power of pardon since the court's powers of revision, parole and commutation of sentences seemed sufficient to address the interests of the convicted person.

Notes

1/ The list of delegations to the Preparatory Committee is contained in A/AC.249/INF/1.

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2/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II.B.I.5; and A/49/355, chap. II.

3/ Ibid., Fiftieth Session, Supplement No. 22 (A/50/22).

4/ General Assembly resolution 49/60, annex.

5/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22).

6/ For more discussion on the role of the Prosecutor, see paragraphs 165 to 167 below.

ANNEX I

Definition of crimes

Chairman's informal texts and compilation of proposals and suggestions with regard to the definition of core crimes

Note. The present paper brings together the Chairman's informal texts on the definition of core crimes and a compilation of proposals and suggestions made by delegations with regard to the definition of such crimes. This compilation is not exhaustive. The texts included do not reflect any generally held views. The Committee did not discuss these texts and does not wish to prejudge the future positions of delegations.

I. GENOCIDE

A. Chairman's informal text on genocide

Article 20 bis a/

Genocide b/

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

[The following acts shall also be punishable:

(a) conspiracy to commit genocide;

(b) direct and public incitement to commit genocide;

(c) attempt to commit genocide;

(d) complicity in genocide.] c/

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B. Compilation of proposals and suggestions with regard to the definition of genocide

Alternative A: Definition by reference

Article 20

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide **[as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;]**

[With respect to the interpretation and application of the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law.]

Alternative B: Definition modelled on Genocide Convention with or without modification

Article 20 bis d/

1. Genocide means any of the following acts committed **[, whether in time of peace or in time of armed conflict]** with intent to destroy, in whole or in **[substantial]** part, a national, ethnic, racial or religious group, **[social or political]** as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent **[preventing]** births within the group;

(e) forcibly transferring children **[persons]** of the group to another group.

2. The following acts shall be punishable: e/

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

[3. Persons committing genocide or any of the other acts enumerated above shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.] f/

[4. "Intent to destroy, in whole or in part, a national ethnical, racial or religious group" means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in the definition.

5. "Mental harm" means permanent impairment of mental faculties through drugs, torture or similar techniques.]

II. AGGRESSION

Compilation of proposals and suggestions with regard to the definition of aggression

[Article 20 ter g/

Aggression h/

Alternative A

[1. Aggression means an act committed by an individual who, as leader or organizer, is involved in the use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.]

Alternative B

[1. The crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate that State's sovereignty, territorial integrity or political independence.]

2. Acts constituting aggression include the following:

Alternative A

[(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State, [or the use of any weapons by a State against the territory of another State.]

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]

Alternative B

[Crimes against peace, namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.]

Alternative proposal

[1. Aggression means the use of force or the threat of use of force [by a State] against the sovereignty, territorial integrity or political independence of [another] [a] State, or the use of force or threat of use of force in any other manner inconsistent with the Charter of the United Nations and customary international law.]

[2. The crime of aggression is committed by an individual who as leader or organizer plans, commits or orders the commission of an act of aggression.]

III. WAR CRIMES

A. Chairman's revised informal text on war crimes

Article 20 quater i/

[War crimes]

[War crimes] means:

1. Grave breaches referred to in the Geneva Conventions of 12 August 1949 [and of Additional Protocol I thereto of 8 June 1977] [such as] [namely]:

[(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement of a civilian;

(h) Taking civilians as hostages.]

[(i) Making the civilian population or individual civilians the object of attack;

(j) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs recognized under international law;

(k) launching an attack against works or installations containing dangerous forces in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects;

(l) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(m) making clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special

/...

arrangement, for example, within the framework of a competent international organization, the object of attack, causing, as a result, intensive destruction thereof, where there is no evidence of the violation by the adverse party of using such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(n) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory in violation of article 49 of the Fourth Convention;

(o) making non-defended localities and demilitarized zones the object of attack;

(p) unjustifiable delay in the repatriation of prisoners of war or civilians.]

[2. Other serious violations of the laws and customs [of war] [applicable in armed conflict], [whether of an international or of a non-international character] [which include, but are not limited to,] [namely] the violations referred to in the 1907 Hague Convention No. IV, [and the serious violations of article 3 common to the Geneva Conventions of 12 August 1949] [and of Additional Protocol II thereto of 8 June 1977] [include but are not limited to] [are]:

[(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property;

(f) violence to the life, health and physical or mental well-being of persons, in particular murder, manslaughter, [rape] [and sexual violence] as well as cruel treatment such as torture, mutilation or any form of corporal punishment, [and human experimentation];

(g) collective punishments;

(h) taking of hostages;

(i) acts of terrorism;

/...

(j) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(k) slavery, [and the slave trade,] [slave-related practices, and forced labour] in all their forms;

(l) pillage;

(m) usage of human shields;

(n) acts of violence designed to inspire or instil terror into that population in whole or in part;

(o) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording fundamental judicial guarantees which are recognized [under general principles of international law];

(p) forcibly using members of the civilian population, including children, to take part in hostilities or to perform forced labour or labour related to military purposes];

(q) failure to remove or protect civilians, particularly children, from areas in which hostilities are taking place to safer areas within the State of nationality of the civilian population, and with respect to children, to ensure that they are accompanied by persons responsible for their safety and well-being];

(r) starving of the civilian population and prevention of humanitarian assistance from reaching them;

(s) intentionally separating children from parents or persons responsible for their safety and well-being;

(t) failure to medically treat the wounded, the sick, the shipwrecked and persons deprived of their liberty for reasons related to the armed conflict;

(u) mistreatment of persons detained or interned].

/...

B. Compilation of proposals and suggestions with regard to the definition of war crimes

Article 20 quater i/

War crimes

[Serious violations of the laws and customs applicable in armed conflict]

[Unless they constitute crimes mentioned in the subparagraph (above) k/ (below),] An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced to [...].

For the purposes of this Code **[of the present Statute] [of the present Convention]**, a war crime means:

1. Grave breaches of the Geneva Conventions of **[12 August]** 1949, namely: **[, the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:]**

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

2. **[The following] [Other serious]** Violations of the laws **[applicable in armed conflicts]** or **[and]** customs of war, **[whether international or internal in character,]** which include, but are not limited to: **[, including serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol thereto of 8 June 1977. These violations shall include, but shall not limited to:]**

[(a) making the civilian population or individual civilians the object of attack]

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

[3. In the case of armed conflict not of an international character occurring in the territory of a State Party:]

[(a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishment;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and other forms of indecent assault;

(f) pillage;

(g) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.]

[(h) threats to commit any of the acts listed under paragraph 3 above.]

Alternative proposal

One delegation, taking as a basis the relevant article of the Rwanda Tribunal Statute, proposes the following formulation:

"Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

"The International Criminal Court shall have the power to prosecute persons committing or ordering to be committed serious violations of

article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of Additional Protocol II thereto of 8 June 1977 where, having regard to the conduct alleged, these acts constitute serious causes of international concern, including but not limited to:

[subparagraphs (a) to (g) as in para. 3 of the preceding formulation]"

IV. CRIMES AGAINST HUMANITY

A. Chairman's informal text on crimes against humanity

Article 20 quinquies l/

Crimes against humanity

"Crimes against humanity" means the following [crimes] [acts], when committed as part of a widespread [and] [or] systematic attack [on a massive scale] against any civilian population:

(a) [murder] [wilful killing];

(b) extermination;

(c) enslavement;

(d) deportation [or forcible transfer of population];

(e) imprisonment [, including taking of civilian hostages];

(f) torture [or other forms of cruel treatment];

(g) rape [or other serious assaults of a sexual nature];

(h) persecutions on political, [national, ethnic,] racial and religious grounds [in connection with any [other] crime within the jurisdiction of the Court];

(i) [other inhumane acts of a similar character [, such as] wilfully causing great suffering or serious injury to body and health];

[other inhumane acts which cause serious injury to body or health].

B. Compilation of proposals and suggestions with regard to the definition of crimes against humanity

Crimes against humanity m/

[1. A person commits crimes against humanity, whether in time of peace or in time of war, when:

/...

(a) he is in a position of authority and orders, commands, or fails to prevent the systematic commission of the acts described below, against a given segment of the civilian population;

(b) he is in a position of authority and participates in the making of a policy or programme designed to systematically carry out the acts described below against a given segment of the civilian population;

(c) he is in a senior military or political position and knowingly carries out or orders others to carry out systematically the acts described below against a segment of the civilian population;

(d) he knowingly commits the acts described below with intent to further a policy of systematic persecution against a segment of the civilian population without having a moral choice to do otherwise.]

[2]

Alternative A

[The International Criminal Court] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on **[discriminatory]** [national, political, ethnic, racial or religious] grounds: **[and which, having regard to the conduct alleged, constitute serious crimes of international concern]**;

Alternative B

[For the purposes of the present Convention "crimes against humanity" means the following acts when committed as part of a widespread and systematic attack against any civilian population unless they constitute crimes defined in the preceding provision:]

Alternative C

[The acts constituting "crimes against humanity" when committed systematically or as part of a public policy against a segment of the civilian population are:]

Alternative D

[A crime against humanity means the widespread or systematic commission, raising international concern, of any or more of the following acts:]

Alternative E

[The following acts when committed as part of a widespread and systematic attack against any civilian population shall be punishable:]

/...

Alternative F

[Crimes against humanity means the following: crimes when committed in armed conflicts, whether international or internal in character, as part of a widespread or systematic attack on a massive scale against any civilian population.]

Alternative G

1. A person commits a crime against humanity when:

(a) he commits one of the acts described in paragraph 2; and

[(b) that act is part of a widespread and systematic attack against a civilian population]

[(c) he commits that act [knowing it is part of] [with the intent to further] a widespread and systematic attack against a civilian population]

2. Acts constituting a crime against humanity when committed as part of a widespread and systematic attack against a civilian population are the following:

Alternative H

[(a) A person commits crimes against humanity, whether in time of peace or in time of war, when he knowingly commits the acts described below against a segment of the civilian population, and when these acts are part of a systematic policy or when they are committed on a widespread basis.

(b) The acts constituting "crimes against humanity" are:]

(a) [wilful] murder [killing or extermination] [, including killings by knowingly creating conditions likely to cause death];

[(b) mutilation];

(b) extermination;

(c) enslavement [, including slavery-related practices and forced labour]; [establishing or maintaining over persons a status of slavery, servitude or forced labour];

(d) [discriminatory and arbitrary] deportation [or unlawful confinement of civilian population] [in violation of international legal norms] [which inflicts death or serious bodily injury];

(e) imprisonment [, in violation of international norms on the prohibition of arbitrary arrest and detention] [which inflicts death or serious bodily injury];

(f) **[cruel treatment including]** torture **[, rape and other serious assaults of a sexual nature]**;

(g) **[outrages upon personal dignity, in particular humiliation and degrading treatment,]** rape **[, enforced prostitution]**;

(h) persecutions on political, racial and religious **[or cultural]** grounds **[, whether based on laws or practices targeting selected groups or their members in ways that seriously and adversely affect their ethnic, cultural or religious life, their collective well-being and welfare, or their ability to maintain group identity]**;

[(h bis) taking civilians as hostages];

[(h ter) wilfully depriving a civilian of the rights of fair and regular trial];

(i) other inhumane acts **[of a similar nature] [, including but not limited to attacks upon physical integrity, personal safety and individual dignity, such as physical mutilation, forced impregnation or forced carrying to term of fetuses that are the product of forced impregnation, and unlawful human experimentation]**.

[Annex

(a) Wilful killing means intentionally or knowingly causing the death of another person, or [causing the death of another person under circumstances manifesting extreme indifference to human life.]

(b) Extermination means:

(i) mass murder; or

(ii) intentionally inflicting conditions of life [calculated to] [which the accused knew or had reason to know would] bring about the physical destruction of a defined segment of the population.

(c) Enslavement means intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him.

(d) Deportation means mass deportation or forced transfer of persons from the territory of a State [or from an area within a State] of which such persons are nationals or lawful permanent residents, except where the acts constituting deportation or transfer are for purposes of an evacuation for safety or other legitimate and compelling reasons.

(e) Imprisonment means the forcible confinement of a person for a prolonged or indefinite period of time in manifest and gross violation of governing legal norms regarding arrest and detention.

/...

(f) Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the accused's custody or physical control; except that torture shall not include pain and suffering arising only from, inherent in or incidental to, lawful sanctions.

(g) Rape means causing a person to engage in or submit to a sexual act by force or threat of force.

(h) Enforced prostitution means intentionally placing or maintaining a person in circumstances in which the person is expected or directed to engage repeatedly over time in sexual acts, and the person's capacity or freedom to refuse has been substantially negated because of the force or threat of force, the circumstances, loss of physical liberty, mental impairment or prolonged periods of serious mental or physical abuse.

(i) Persecution means the intentional and severe deprivation of fundamental rights, without lawful justification.

(j) The term "widespread" means the attack is massive in nature and directed against large numbers of individuals.

(k) The term "systematic" means the attack constitutes, or is part of, consistent with or in furtherance of, a policy or concerted plan, or repeated practice over a period of time.]

Notes

a/ After completion of the definitions of crimes and discussion of jurisdiction and other related issues, adaptations to the present text may be required.

b/ The acts enumerated here are identical to those of articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide.

c/ The paragraph in square brackets above may become unnecessary if there is a separate article covering those elements.

d/ Text reproduced from article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Additions are indicated in bold type.

e/ Another suggestion is to delete this paragraph and to include, in the General Part of the Statute, provisions regarding conspiracy, incitement, attempt and complicity in the commission of the core crimes under the court's jurisdiction.

f/ Text reproduced from article IV of the Genocide Convention.

g/ This represents a number of alternatives for illustrative purposes. Some delegations believe that these are all inadequate.

/...

h/ Some delegations are for and some are against the inclusion of "aggression" in the crimes covered by the international criminal court.

i/ The present text represents a compilation of different possibilities for illustrative purposes. Adaptations of the present text may be required after completion of the definitions of crimes and discussion of jurisdiction and other related issues.

j/ Unless indicated in bold type, the present text is based on the revised article on war crimes proposed by the Special Rapporteur of the International Law Commission for consideration in second reading of Draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466, p. 26).

k/ In the text of one proposal, the order of paragraphs 1 and 2 of the draft article should be inverted.

l/ Adaptations of the present text may be required after completion of the definitions of crimes and discussion of jurisdiction and other related issues.

m/ Unless indicated in bold type, the present text is based on article 3 on crimes against humanity of the Statute of the International Criminal Tribunal for Rwanda.

ANNEX II

General principles of criminal law*

The present Annex contains possible elements to be included in a part [4 bis] of the draft statute for the international criminal court [and/or in an annex to the statute forming an integral part thereof] including a compilation of pertinent written proposals from the delegations of Canada, Japan and other States, as well as, for illustrative purposes, other possible text options drawn from the statutes of the International Tribunals for the former Yugoslavia and Rwanda and the revised Siracusa draft, and accompanying notes giving indications of some questions which need to be further considered by delegations.

Note. Nothing in this paper represents the national position of the delegation of Sweden, nor a text agreed upon among delegations. This paper identifies examples of some possible texts. Others may no doubt be elaborated.

A. Substantive issues

Nullum crimen sine lege/Non-retroactivity

Text

1. Combined text covering the principle of legality and the principle of non-retroactivity in one article:

(a) Proposal submitted by Austria

"1. Principle of legality (nullum crimen sine lege). An accused shall not be held guilty:

(a) In the case of a prosecution with respect to a crime referred to in article 20(a) to (d), unless the act or omission in question constituted a crime under international law;

(b) In the case of a prosecution with respect to a crime referred to in article 20(e), unless the treaty in question was applicable to the conduct of the accused,

at the time the act or omission occurred.

"2. Irrespective of paragraph 1(a) above, the court shall not exercise its jurisdiction in relation to crimes under articles 20(a) to (d) over acts or omissions which occurred prior to the entry into force of the statute.

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* This paper reflects the result of the informal consultations coordinated by Sweden.

"3. Paragraph 2 above shall not affect the character of such acts or omissions as crimes under international law."

(b) Proposal submitted by Germany

"A person can only be punished if the act or omission in question constituted a crime under this Statute at the time the act or omission was committed, provided that the Statute was applicable in accordance with its article 21, 22 or 23.

(c) Proposal submitted by Japan (I)

"This Statute applies only to a conduct which is done after the entry into force of this Statute, and no conduct shall be punished by this Court unless it is an offence under the definition of the crimes of this Statute."

2. Texts providing separately for the principle of legality and for the principle of non-retroactivity:

Siracusa draft (nullum crimen sine lege) to supplement article 39 of the ILC draft statute (33-1)

"1. An act may be punished under this Statute only if, prior to its commission, it has been made punishable by international law or by national law which is in accordance with international law.

"2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied."

Note

The above approach might be compared to that adopted in the Statute of the Tribunal for the former Yugoslavia (article 2) and the Statute of the Rwanda Tribunal (article 1). Thought should be given to the possibility of concurrent temporal jurisdiction of the international criminal court and the International Tribunals.

Individual responsibility

(a) Personal jurisdiction

Text

(i) Statute of the former Yugoslavia Tribunal (6)

> "The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present statute."

(ii) Siracusa draft (33-2)

> "1. A person who commits a crime under this statute is individually responsible and liable for punishment."
>
> "...
>
> "4. The fact that the present statute provides criminal responsibility for individuals does not prejudice the responsibility of States under international law."

Note

The question of the criminal liability of corporations or other legal persons may need to be considered.

(b) Principle of criminal responsibility

Text

Proposal submitted by Canada

> "A person is criminally responsible and may be punishable for a crime if the person, with the mental element required for the crime:
>
> (a) Commits the act or makes the omission specified in the description of the crime;
>
> (b) Causes the consequences, if any, specified in that description; and
>
> (c) Does so in the circumstances, if any, specified in that description."

Note

Specific elements of this definition will be discussed under other headings.

(c) Participation/Complicity

Text

(i) Proposal submitted by Canada

"Every person is a party to, and is criminally responsible for, a crime that is committed, if the person:

(a) Actually commits it;

(b) Does or omits to do anything for the purpose of aiding or abetting any person to commit it; or

(c) Counsels, orders or incites any person to be a party to it, where the person counselled, ordered or incited is afterwards a party to it as a result."

(ii) Proposal submitted by Japan (V)

"1. Co-principals

"When persons did a criminal conduct jointly with a common intent to commit such offence, each person shall be punished as principal.

"2. Criminal solicitation

"1. A person is guilty of criminal solicitation, if, with the purpose of making another person decide to commit an offence, he/she commands, encourages or requests another person to engage in specific criminal conduct, when such person did criminal conduct according to such solicitation.

"2. The punishment of criminal solicitation shall be the same as that of principals which is provided for in this Statute.

"3. Accessories

"1. A person is guilty of accessories if he/she did a conduct which facilitates the commission of an offence.

"2. The punishment of accessories shall be reduced."

Explanatory note by the Japanese delegation

"This draft does not include provisions to punish conspiracy or criminal solicitation without accompanying the actual execution of an offence based on such conspiracy or solicitation. A person who participated in a conspiracy or made solicitation of a crime is punishable only after a principal actually committed a crime based on such conspiracy or solicitation.

/...

"On the other hand, in the case of exceptionally serious offences, it may be necessary to punish a conduct of plot or preparation before the commencement of the execution of a crime. However, so as to limit such application in exceptional cases, this should be provided for, not in the general principles of criminal law but, only in the case it is necessary, in the provisions which deal with the definition of each offence."

(iii) Statute of the former Yugoslavia Tribunal (7.1)

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present statute, shall be individually responsible for the crime."

(iv) Siracusa draft (33-9)

> "1. Any person who plans, instigates, orders, commits or otherwise aids and abets in the attempt or execution of a crime under this Statute shall be individually responsible for the attempted or accomplished crime.
>
> "2. Each party to a crime shall be subject to punishment in accordance with his own individual responsibility apart from the responsibility of other participants."

Note

The importance of being able to punish the planners was recognized (see notes under "Conspiracy" below).

Irrelevance of official position

Text

(i) Proposal submitted by Austria

> "Immunity
>
> "In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law.

(ii) Statute of the former Yugoslavia Tribunal (7.2)

> "2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

(iii) Siracusa draft (33-2.2)

"2. The official position of an individual who commits a crime under this Statute and particularly the fact that he acts as head of State or government or as a responsible government official does not relieve him of criminal responsibility nor mitigate punishment."

Age of responsibility

Text

(i) Proposal submitted by Japan (III.3)

"A person is not responsible if he/she is under fourteen years of age at the time of criminal conduct."

(ii) Proposal submitted by the Netherlands

"1. A person under the age of [twelve, sixteen] is deemed not to know the wrongfulness of his acts or omissions at the time stated in the indictment [mentioned in article 27] and shall therefore not be responsible [under this Statute] unless the contrary has been proven by the Prosecutor.

"2. A person who is deemed due to his age [by the Presidency/the court] not to know the wrongfulness of his acts or omissions at the time stated in the indictment [mentioned in article 27] shall not be responsible [under this Statute]."

(iii) Siracusa draft (33-3)

"1. A person under the age of sixteen at the time of the commission of a crime shall not be responsible under this Statute.

"2. A person between the age of sixteen and twenty-one at the time of commission of a crime shall be evaluated as to his maturity whether he is responsible under this Statute."

Note

Different views exist among States as to a specific age of responsibility.

Statute of limitations

Text

(i) Proposal submitted by Japan (VII.1)

"1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

"2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

"3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State which has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned."

(ii) Siracusa draft (33-18)

"There is no statute of limitations for those crimes within the [inherent] jurisdiction of the [Tribunal]."

Note

With regard to the Siracusa draft, some delegations observed that for any crimes which are not within the inherent jurisdiction of the court, the court itself should determine the statute of limitations. Some delegations observed that no statute of limitations should apply. Other delegations observed that it should.

Actus reus (act and/or omission)

Text

(i) Proposal submitted by Canada

"Omission

"A person may be criminally responsible for an omission if:

(a) The omission is specified in the description of the crime, and the person could have, but failed to avoid the omission; or

(b) In the circumstances:

(i) The person is under a legal obligation to avoid the consequences specified as a constituent element in the description of a crime;

(ii) The consequence caused by the omission corresponds to the consequence that would be caused by a commission of such crime by means of an act; and

(iii) The person could have, but failed to, avoid the consequences of such crime."

(ii) Proposal submitted by Japan (II.1)

"Omission

"A person who fails to avoid the result of an offence is responsible for such offence if:

(a) He/she is under a legal obligation to avoid such result,

(b) The degree of the unlawfulness realized by such omission corresponds to that of the unlawfulness to be realized by the commission of such offence, and

(c) He/she could have avoided such result."

(iii) Siracusa draft (33-5)

"Omission

Failure to carry out pre-existing legal duty constitutes material element of an offence when the person acted with knowledge or intent."

Note

The concept of "omission" also appears in the Canadian proposal reproduced above under the heading "Individual responsibility: (b) principle of criminal responsibility"; as well, reference should also be made to another proposal by Canada under "Participation/complicity".

The concept of "omission" presents particular problems to various legal systems.

The extent to which the concept of omission could raise the question of liability may be considered.

/...

Causation and accountability

Text

Siracusa draft (33-6)

"Criminal responsibility under this Statute presupposes that the harm required for the completion of a crime is caused by and accountable to the perpetrator's act or omission."

Note

Delegations may wish to omit these two elements from the statute.

Mens rea

Text

(i) Proposal submitted by Canada (I.2-4)

"2. Intention

"A person has intent where:

(a) In relation to conduct, that person means to engage in the act or omission;

(b) In relation to a consequence, that person means tc cause that consequence or is aware that it will occur in the ordinary course of events.

"3. Knowledge

"'Know', 'knowingly', or 'knowledge' means:

(a) To be aware that a circumstance exists; or

(b) To be aware that there is a substantial likelihood that a circumstance exists and to deliberately avoid taking steps to confirm whether that circumstance exists.

"4. Recklessness

"4.1 A person is reckless with respect to a circumstance if:

(a) That person is aware of a substantial risk that the circumstance exists; and

(b) The person is aware that the risk is highly unreasonable to take.

"4.2 A person is reckless with respect to a consequence if:

(a) That person is aware of a substantial risk that the consequence will occur; and

(b) The person is aware that the risk is highly unreasonable to take."

(ii) Proposal submitted by Japan (III.1-1)

"At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable."

(iii) Siracusa draft (33-7)

"Unless otherwise provided for, crimes under this Statute are punishable only if committed with knowledge or intent, whether general or specific or as the substantive crime in question may specify."

Note

The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered.

Mistake of fact or law

Text

(i) Proposal submitted by Japan (III.1)

"Mental element

"1. At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

"2. Even if a person, at the time of a conduct, does not realize its unlawfulness, he/she is criminally responsible in the case unless such error is unavoidable; provided that the sentence may be reduced."

(ii) Proposal submitted by the Netherlands

"Mistake of fact or of law

"Unavoidable mistake of fact or of law shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of act or of law may be considered in mitigation of punishment."

(iii) Siracusa draft (33-15)

> "1. A mistake of law or a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.
>
> "2. The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced."

Note

Some delegations expressed doubts over including these concepts in the statute.

Doubts were also expressed as to whether these concepts are negations of responsibility or a defence.

Attempts

Text

(i) Proposal submitted by Canada (I.6)

> "6.1 A person attempts to commit a crime where that person, having an intent to commit the crime, does or omits to do anything for the purpose of carrying out that intent that is more than mere preparation to commit the crime.
>
> "6.2 A person is guilty of an attempt even if committing the crime is impossible or is prevented by a fortuitous event."

(ii) Proposal submitted by Japan (II.2)

> "1. A person who commences the execution of an offence, but fails to complete it for reasons of circumstances independent of his/her will, is guilty of attempt.
>
> "2. An attempt of an offence is punishable only when so provided for in this Statute.
>
> "3. The period of imprisonment of an attempt may be reduced."

(iii) Siracusa draft (33-8)

> "1. A person is punishable for an attempt if, with the intent to commit the crime, he engages in conduct constituting a substantial step towards the accomplishment of that crime.
>
> "2. If the person abandons his effort to commit the crime or otherwise prevents the accomplishment of the crime, he is not punishable if he completely and voluntarily has given up his criminal purpose before the crime was committed."

Note

With regard to the Siracusa draft it was noted that some jurisdictions do not recognize "abandonment" as a defence. Questions were raised as to whether the concept of "abandonment" should be included in the definition of "attempt", or should be dealt with separately in the statute. It was also observed that an intervening event might break the chain of causation.

Conspiracy

Text

(i) Proposal submitted by Canada (I.7)

> "7.1 A person conspires to commit a crime where the person agrees with one or more persons that a common intention to commit a crime be carried out and an overt act is committed by the person or by at least one other party to the agreement for the purpose of furthering the agreement.
>
> "7.2 A person is guilty of conspiracy even if the object of the conspiracy is impossible or is prevented by a fortuitous event."

(ii) Siracusa draft (33-10)

> "A person is punishable for conspiracy when, with the intent to commit a specific crime, he agrees with another to perpetrate that crime and engages in an overt act that manifests his intent."

Note

See also article 6.1 of the Rwanda Statute.

It was noted that there were conceptual differences concerning conspiracy among the different legal systems.

The question was raised as to whether a planner should be punished when the crime was not completed, yet action had been taken to implement the plan.

Some delegations questioned whether this concept should be included in the general part of the statute, although it might be necessary to punish such conduct in cases of exceptionally serious crimes. See the explanatory note by the Japanese delegation under "Individual responsibility: (c) participation/complicity", proposal (ii), above.

Command responsibility

Text

(i) Proposal submitted by the United Kingdom of Great Britain and Northern Ireland

"In addition to other (types of complicity) (modes of participation) in crimes under this Statute, a commander is also criminally responsible (as an aider or abettor) for such crimes committed by forces under his command as a result of his failure to exercise proper control where:

"(a) He either knew or, due to the widespread commission of the offences, should have known that they were committing or intending to commit the offences, and

"(b) He did not take all necessary measures within his power to prevent or repress their commission."

(ii) Statute of the former Yugoslavia Tribunal (7.3)

"3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

(iii) Siracusa draft (33-2)

"3. The fact that a crime under this Statute was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, under the circumstances of the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime."

Insanity/diminished mental capacity

(i) Proposal submitted by Japan (III.2)

"Insanity

"1. A person is not responsible for a criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he/she lacks substantial capacity either to appreciate the unlawfulness of his conduct or to conform his/her conduct to the requirement of law.

"2. When such capacity is substantially diminished at the time of the conduct, the sentence shall be reduced."

(ii) Siracusa draft (33-4)

"1. A person is legally insane when at the time of the conduct which constitutes a crime, he suffers from a mental disease or mental defect, resulting in his lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and such mental disease or mental defect caused the conduct constituting a crime."

Note

The question was raised whether this defence should be included.

The question was also raised whether a provision was required to deal with the issue of whether the accused is fit to stand for trial. That provision might be included in the chapter on trial/procedural rules.

Intoxication

Text

(i) Siracusa draft (33-4)

"2. A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence."

/...

Note

The point was made that there were essentially two questions:

(a) Whether intoxication should be available as a defence or as a negation of mens rea;

(b) If available as a defence, should it be spelled out in the statute or elaborated in another way. (See sect. B below.)

Ability to stand for trial

This concerns insanity/old age/illness. It was noted that this type of defence should be dealt with under the chapter on trial/procedural rules.

Self-defence/Defence of others/Defence of property

Text

(i) Proposal submitted by Canada (I.9)

"Self-defence or defence of the person

"9.1 A person is not guilty of a crime to the extent that a person acts in self-defence or in defence of another person.

"9.2 A person acts in self-defence, or in defence of another person, if the person acts reasonably for the defence of that person or another person, in response to a reasonable apprehension of unlawful force or threatened force."

(ii) Proposal submitted by Japan (IV.3)

"Self-defence

"1. A person who did a necessary and reasonable conduct to protect himself/herself or any other person against present and unlawful attack is not punishable.

"2. If a person exceeds the limitation of justifiable defence of paragraph 1, the sentence may be reduced."

(iii) Siracusa draft (33-12)

"1. Self-defence consists in the use of force against another person which may otherwise constitute a crime when and to the extent that the actor reasonably believes that such force is necessary to defend himself or anyone else against such other person's imminent use of unlawful force, and in a manner which is reasonably proportionate to the threat or use of force.

> "2. Self-defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of the danger involved or the interest to be protected by the defence act."

Note

Several questions were raised: (a) whether a provision relating to defence of property should be included in the statute; (b) whether self-defence should be used as a defence in response to a threat of unlawful force; (c) whether pre-emptive self-defence is valid; (d) whether self-defence should be limited to certain types of crimes under article 20; and (e) whether or not self-defence should be allowed in specific cases, at the discretion of judges.

Necessity

Text

(i) Proposal submitted by Canada (I.11)

> "11.1 A person is not guilty of a crime to the extent that the person acts out of necessity, unless that person knowingly and without reasonable excuse has exposed himself or herself to the circumstances creating the necessity.
>
> "11.2 A person acts out of necessity if that person:
>
> (a) Reasonably believes there is a threat of imminent or otherwise unavoidable death or serious bodily harm to that person or to another person; and
>
> (b) Acts reasonably to avoid that threat."

(ii) Proposal submitted by Japan (IV.4)

> "1. A conduct done, in the present danger for life, body or freedom, to avoid such danger of himself/herself or any other person, is not punishable, if (a) there exists no other way to avoid such danger, and (b) the interest protected by such conduct exceeds the interest infringed by such conduct.
>
> "2. If a person exceeds the limitation of justifiable defence of paragraph 1, the sentence may be reduced."

(iii) Siracusa draft (33-13)

> "1. Necessity excludes punishment when circumstances beyond a person's control are likely to create an unavoidable private or public harm, and that person engages in criminal conduct only to avoid the greater imminent harm likely to be produced by such

circumstances. This defence does not include use of deadly force."

Note

The question was raised as to the crimes to which the defence of necessity might apply.

The question was also raised as to whether the defence of necessity should include the use of deadly force.

Duress/Coercion

Text

(i) Proposal submitted by Canada (I.10)

> "10.1 A person is not guilty of a crime to the extent that the person acts under duress or coercion, unless that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion.
>
> "10.2 A person acts under duress or coercion if that person:
>
> (a) Reasonably believes that there is a threat of imminent or otherwise unavoidable death or serious bodily harm to that person or another person; and
>
> (b) Acts reasonably in response to that threat."

(ii) Proposal submitted by Japan (IV.2)

> "A conduct coerced to do so by the use of, or threat to use, unlawful force against his/her person or the person of another, which a person of reasonable firmness would have been unable to resist, is not punishable."

(iii) Siracusa draft (33-13)

> "2. A person acts under coercion when he is compelled by another under an imminent threat of force or use of force directed against him or another, to engage in conduct which may otherwise constitute a crime which he would not otherwise engage in, provided that such coerced conduct does not produce a greater harm than the one likely to be suffered and is not likely to produce death."

/...

Lesser of evils

This defence, components of which appear under other defences, may not need to be included in the statute.

Superior orders

Text

(i) Proposal submitted by Japan (IV.1)

> "The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him/her of criminal responsibility; provided that the sentence may be reduced according to the circumstances."

(ii) Statute of the former Yugoslavia Tribunal (7.4)

> "4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." [See also Rwanda Statute article 6.3.]

(iii) Siracusa draft (33-16)

> "1. A person acting pursuant to an order of a government or a superior, whether military or political, is not relieved of criminal responsibility, if the order appears to be manifestly unlawful and the person at a greater risk to himself has no alternative but to obey, or has no other moral choice. In such cases, the norms of articles 33-13 and 33-15 shall apply."

Note

Three questions were raised:

(a) Should those troops who obey what appears to them at the time to be a manifestly lawful order, be criminally responsible if it transpires that their commander was acting illegally in giving the order?

(b) Should those troops who receive an order which is not manifestly lawful but simply lawful, be criminally responsible if it transpires that their commander was acting illegally in giving the order, and if they should have made further inquiries before obeying the order?

(c) What rules of law govern the legality or otherwise of an order?

Possible defences under public international law

It was suggested to include the "Hafner list" as is:

- Military necessity;
- Reprisals;
- Article 51 of the Charter of the United Nations (cf. justifications in the International Law Commission draft on State responsibility).

Text

Siracusa draft (33-13)

"3. Military necessity may exclude punishment only as provided by the international law of armed conflict."

Note

It was questioned whether defences under public international law should be included in the general part of the statute, since they to a large extent relate to inter-State relations; whether a savings clause could be included in reference to the rights and duties of States under the Charter of the United Nations and the functions and powers of the principal organs of the United Nations under the Charter; and which set of rules governing reprisals should apply.

Exhaustive or enumerative list of defences?

Text

(i) Proposal submitted by the Netherlands

"Notwithstanding the foregoing articles on defences the court shall have the competence to take into account other defences, recognized by the country in the territory of which the alleged crime has been perpetrated or by the law of the country the nationality of which the accused had at the time of the perpetration [commission]."

(ii) Siracusa draft (33-11)

"1. The court shall determine the admissibility of reasons excluding punishment in light of the character of each crime.

"2. Defences include but should not be limited to those in articles 33-12 to 33-17."

/...

Note

Different views were held as to whether the list of defences should be exhaustive or enumerative. This leads to the question under section B below.

B. Further elaboration by the court of general principles of criminal law

Note

The question was raised as to whether the court should be empowered to elaborate/legislate further the general principles of criminal law which are not written in the statute. (Please note that the draft ILC statute contains a provision on this question in article 19.):

(a) If so, one of the possible solutions may be found in the proposal by Canada concerning article 20 (bis) which reads as follows:

> "1. Subject to paragraphs 2 and 3, the judges may by absolute majority elaborate the elements of the crimes set out in article 20 and elaborate principles of liability and defence that are not otherwise set out in, and that are not inconsistent with, the elements and principles in the statute or in annex B. In elaborating elements and principles, the court shall not create any new offences or crimes.
>
> "2. The initial elements and principles elaborated by the court shall be drafted by the judges within six months of the first elections for the court, and submitted to a conference of States parties for approval. The judges may decide that an element or principle subsequently elaborated under paragraph 1 should also be submitted to a conference of States parties for approval.
>
> "3. In any case to which paragraph 2 does not apply, elements or principles elaborated under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.
>
> "4. An element or principle may provide for its provisional application in the period prior to its approval or confirmation. An element or principle not approved or confirmed shall lapse."

Note should be taken of the link to the choice of sources of law in connection with possible further elaboration of general principles of criminal law by the court.

(b) It was stated by some delegations, however, that the court should not be empowered to legislate general principles of criminal law. In this case, a possible solution is found in the proposal by Japan on article 33 which reads:

> "1. The court shall apply this statute.

"2. When the court cannot find the necessary provision to be applied, the court may apply:

(a) The national law of the State where the crime was committed;

(b) If the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(c) If the laws of the States mentioned in (a) and (b) do not exist, the national law of the State of nationality of the accused, or if the accused does not have any nationality, the national law of the State of permanent residence of the accused; or

(d) If the laws of the States mentioned in (a), (b) and (c) do not exist, the national law of the State which had custody of the accused,

as far as these laws are consistent with the objectives and purposes of this Statute."

Note should be taken of other proposals submitted on article 33, which are:

(i) Proposal submitted by Canada

"1. The court shall apply:

(a) The Statute, including annexes A and B, rules adopted pursuant to article 19, and elements of crimes and principles of liability and defence elaborated pursuant to article 20 bis;

(b) Applicable treaties and the principles and rules of general international law; and

(c) Principles of law developed by the court from national law.

"2. In developing principles of law as referred to in paragraph 1 (c), the court shall [**conduct and**] take into account [**a survey of**] the national laws of States representing the major legal systems of the world, where those laws are not inconsistent with international law and internationally recognized norms and standards.

"The court shall only apply paragraph 1 (c) to the extent that a matter is not covered by paragraphs 1 (a) or (b)."

(ii) Proposal submitted by Switzerland

"The court shall apply:

(a) Its statute, including the annexes thereto;

(b) The other relevant rules of international law;

(c) General principles of criminal law identified by it and approved by States parties to the statute;

(d) Rules of national law, to the extent authorized by the statute, and

(e) Its Rules of Procedure and Evidence."

(iii) Proposal submitted by the United States of America

"1. This Statute (and the rules promulgated thereunder) shall be the primary source of law for the court.

"2. To the extent not inconsistent with the above, the court may apply principles and rules of law which are generally recognized in national legal systems as a subsidiary source of law.

"3. To the extent not inconsistent with the above, the court may apply specific rules of applicable national law, or applicable treaty provisions, where necessary to the determination of a specific question which is governed by such law or treaty, or where the application or interpretation of such specific law or treaty is in fact at issue in the case."

Note

Article 33 obviously has a bearing on many parts of the statute. The fact that it is taken up here does not imply that it should be placed in the part dealing with the general principles of criminal law.

The question of penalties is not included in this document as it will be discussed at the August session of the Preparatory Committee.

ANNEX III

Complementarity

A compilation of proposals made in the course of discussion for amendment of the ILC draft statute

Note. This paper is designed to reflect the proposals of delegations made during the course of discussion on the issue of complementarity. It follows the original text of the ILC draft statute, which is represented in ordinary type. Delegations' proposals for amendments are represented in bold type.

Where a deletion of text has been proposed, the original text is surrounded by parentheses which are in bold type, e.g., in the third preambular paragraph, certain delegations proposed that the phrase "(in cases where such trial procedures may not be available or may be ineffective)" be removed from the draft.

Where an addition of text has been proposed, the original text is interrupted by square brackets, which contain the proposed additional text in bold type, e.g., the proposal of certain delegations that an extra paragraph be added to the preamble, thus: "[**Recognizing that it is ... such serious crimes;**]".

This compilation is not exhaustive. The texts included do not reflect any generally held views. The Committee did not discuss these texts and does not wish to prejudge the future positions of delegations.

I. **Preamble**

"Desiring to further international cooperation ...;

"Emphasizing that such a court is intended ...;

"[**Recognizing that it is the primary duty of States to bring to justice persons responsible for such serious crimes;**]

"Emphasizing further that such a court is intended to be complementary to national criminal justice systems [**in cases where such systems may be ineffective** AND/OR **in cases where national jurisdiction is unavailable**] (in cases where such trial procedures may not be available or may be ineffective); a/

OR

"Emphasizing further that **the international criminal court shall complement national criminal justice systems when they are unable or unwilling to fulfil their obligations to bring to trial such persons;**"

II. **Article 1**

"There is established an International Criminal Court ("the Court") [**which shall be complementary to national criminal justice systems. Its jurisdiction and functions**] (whose jurisdiction and functioning) shall be governed by the provisions of this Statute."

III. **Article 4(1)**

"The Court is a permanent institution open to States parties in accordance with this Statute. [**In accordance with the provisions of this Statute**] It shall act when required to consider a case submitted to it."

IV. **Article 26**

A. Article 26(1)

"On receiving a complaint [**under article 25**] or upon notification of a decision of the Security Council referred to in article 23(1), the Prosecutor shall [**determine prior to initiating an investigation**

(a) whether the complaint provides or is likely to provide a reasonable basis for proceeding with a prosecution under this Statute;

(b) whether the case is or would be inadmissible under article 35;

(c) whether to seek a preliminary ruling from the Court regarding the Court's jurisdiction if the case could later be challenged under article 34; and

(d) whether an investigation would be consistent with the terms of any relevant Security Council decision.]

> (initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.)"

B. Insert new **article 26(2)**:

[**"The Prosecutor shall not initiate an investigation into a complaint if the Prosecutor has made an affirmative determination under article 26(1)(a), (b), or (c). The Prosecutor shall take into account the terms of any relevant Security Council decision."**]

C. Article 26(4)

"If (upon investigation and having regard, inter alia, to the matters referred to in article 35,) the Prosecutor concludes that [**a case is inadmissible under article 35 or that**] there is no sufficient basis for a prosecution [**or that a prosecution would not be in the interests of justice**] (under this Statute) and decides not to file an indictment, the Prosecutor shall

/...

so inform the Presidency giving details of the (nature) [**matters**] and basis of the complaint and of the reasons for not filing an indictment."

D. Insert new **article 26(7)**

["In the event the Prosecutor defers investigation on the ground that a State is proceeding with a national investigation, then the Prosecutor may request that the relevant State make available to the Prosecutor, either periodically or on reasonable request, a report on the progress of its investigation, which shall be confidential to the extent necessary. The Prosecutor shall notify the complainant State of the decision to defer to a State and shall notify the complainant State of any known outcome of such national investigation or prosecution."]

E. Insert new **article 26(8)**

["The Prosecutor shall not initiate an investigation into a case that has been investigated and prosecuted by a State following a deferral by the Prosecutor unless

(a) the complainant State has lodged a further complaint with the Court on the grounds that the State investigation (or prosecution) has been inadequate, and the Prosecutor agrees;

(b) following the Prosecutor's notice to the State where the case was prosecuted of the new complaint and of its opportunity to challenge the initiation of an investigation by the Prosecutor, the State where the case was prosecuted has challenged such an investigation by the Prosecutor and either has failed under the Statute to prevent the new investigation or has failed after a reasonable period of time to challenge the initiation of the new investigation; and

(c) the Prosecutor, upon renewed consideration, has not reached any affirmative determination under article 26(1)(a), (b), or (c)."]

RENUMBERING: Articles 26(2), (3), (4) and (5) become **articles 26(3), (4), (5) and (6)** respectively and article 26(6) becomes **article 26(9)**.

V. **Article 27**

"1. If upon investigation the Prosecutor concludes that [**the case is admissible, that**] there is a prima facie case [**which the accused could be called on to answer and that it is desirable in the interests of justice that the case should proceed**], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

"2. The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; (and)

/...

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court [**and**

(c) whether it is desirable in the interests of justice that the case should proceed].

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9."

VI. **Article 34**

"Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) prior to or at the commencement of the hearing, by an accused or any interested State; and

(b) at any later stage of the trial, by an accused [**if he has not done so at the commencement of the hearing**]."

VII. **Article 35**

"[**Having regard to the purposes of this Statute as set out in the preamble**]

OR

[**In order to ensure the complementarity of its action with that of national criminal justice systems**].

(The Court (may) [**shall**],) on application by the accused or at the request of an interested State b/ at any time prior to [**or at**] the commencement of the trial, or of its own motion, [**the Court (may) shall**] (decide) [**declare**]

> (having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question)
>
> OR
>
> [**the case inadmissible if the Court determines that, having regard to the purposes of this Statute set out in the preamble**]:

(a) [**the case before it**] has been duly investigated by a State with jurisdiction over it, and (the decision of that State not to proceed to a prosecution is apparently well-founded) [**that the State has decided not to proceed to a prosecution**];

(b) [**the case before it**] is under investigation [**or prosecution, or a request for mutual assistance or extradition has been made,**] by a State which has (or may have) jurisdiction over it, and (there is no reason for the Court to

/...

take any further action for the time being with respect to the crime) [**the investigation, prosecution or request is being duly undertaken or acted upon**]; or

(c) [**the case before it**] (is not of such gravity to justify further action by the Court) [**does not fall within the jurisdiction of the Court as defined in article 20 of the Statute**].

[**When the Court takes a decision under subparagraph (b) above, the Court may, upon information on the proceedings by the investigating or prosecuting State, which the Court is entitled to request, review its decision on the admissibility of the case.**]"

Insert new **article 35(b)**:

[**"there is a reasonable prospect [likelihood** OR **significant likelihood** OR **significant prospect] that the accused will be tried by a State which has or may have jurisdiction over the crime;"**]

Insert new **article 35(d)**:

[**"the accused is not liable under article 55 to be prosecuted before or punished by the Court;"**]

Insert new **article 35(f)**:

[**"the accused has already been tried for acts constituting a crime of the kind referred to in article 20, and a trial by the Court is not permitted under article 42;"**]

RENUMBER ILC draft article 35 accordingly, so that article 35(a) becomes **35(c)**, 35(b) becomes **35(a)**, and article 35(c) becomes **35(e)**.

Insert new **article 35(2)**:

[**"The Court may at any later stage declare 'provisional inadmissibility' and interrupt its proceedings if the crime is being prosecuted by a State which has jurisdiction over it."**]

RENUMBER ILC draft article 35 accordingly as **35(1)**.

ALTERNATIVE ARTICLE 35: c/

[**"(1) A case is inadmissible before the Court if:**

(a) matters which include or comprise those in respect of which the complaint has been made are being investigated by a State with jurisdiction over them, unless the Court is satisfied that, in all the circumstances

((i) there has been and continues to be (unreasonable and) unconscionable) d/) delay in the conduct of the investigation (prosecution, acquittal, pardon or conviction), or)

(ii) the investigation (prosecution, acquittal, pardon or conviction) was instituted, or has been and is being conducted, in a way which clearly indicates an absence of good faith (in so far as being designed to shield the accused from international criminal responsibility);

(b) proceedings relating to any matter which includes or comprises those matters in respect of which the complaint has been made are pending before any court in a State with jurisdiction over any such matter or an extradition request or request for international cooperation made by such a State is under consideration in another State unless the Court is satisfied that, in all the circumstances:

(i) there has been and continues to be ((unreasonable) (and unconscionable) d/) delay in the conduct of the proceedings or the consideration of the request, or

(ii) the proceedings were instituted or are being conducted, or the request is being considered, in a way which clearly indicates an absence of good faith; d/

(c) the matters in respect of which the complaint is made have been investigated by a State with jurisdiction over them and that State has decided not to prosecute the accused or to prosecute him for an offence which is not an offence listed in article 20, a prosecution there has been discontinued or the accused has been acquitted, pardoned or convicted, unless the Court is satisfied that, in all the circumstances

(i) the national decision was not made in good faith, d/ or

(ii) where the accused was convicted of an offence other than one listed in article 20, or was acquitted of (or pardoned) in respect of any offence, the proceedings were not instituted, or the prosecution conducted, in good faith; d/

(d) the accused is not liable to be prosecuted before or punished by the Court under article 55 of this Statute; or

(e) the matters of which the complaint has been made were not of exceptional gravity such as to justify further action by the Court.

"(2) (An application by the accused or) a request by a State (OR an interested State) to the Court to declare a case inadmissible under paragraph 1 may be made at any time before (or at the commencement of) the trial (and must give reasons). (The accused may bring a challenge only after indictment and only on the grounds specified in article 35(1)(c).)

"(3) The Court may at any time and of its own motion declare a case inadmissible under paragraph (1) of this article.

"((4) A vote of two thirds of the members of the Court shall be required before the Prosecutor can investigate and prosecute a case under article 35(1)(c).)"]

VIII. **Article 36**

"(1) In proceedings under articles 34 and 35, the accused and the complainant States [**and any State which has (or may have) jurisdiction over the crime**] have the right to be heard.

"[**(3) In cases where the jurisdiction of the Court is called into question, the proceedings shall be interrupted until the competent chamber has reached its decision on this point.**]

IX. **Article 42**

"(1) No person shall be tried before any other court ...

"((2) A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if [**the proceedings before the other court were manifestly intended to shield the accused from his international criminal responsibility.**]:

((a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

OR

[**the characterization of the act by the national court does not correspond to its characterization under this Statute; or**]

OR

[**the national proceedings did not take account of the international character and the grave nature of the act; or**])

((b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.))

"(3) In considering the penalty to be imposed on a person convicted under this Statute, the Court shall (take into account) [**count**] the extent to which a penalty imposed by another court on the same person for the same act has already been served."

X. **Article 51(1)**

"States parties shall [**in a case which is (decided by the Court as) not inadmissible under article 35**] cooperate with the Court in connection with criminal investigations and proceedings under this Statute."

XI. **Article 53**

"((2)(a)(i) in a case covered by article 21(1)(a), or)

"...

"((4) A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.)".

Notes

a/ Some delegations suggested that the concept of "complementarity" and/or the terms "unavailable" and "ineffective" should be defined in the Statute; some suggested that the latter terms should be reviewed or replaced.

b/ It has been proposed by certain delegations that the concept of "an interested State" be more precisely defined in the Statute whenever it is used, and suggestions include:

- **"any State party"**;
- **"a competent or interested State"**;
- **"any State which has jurisdiction over the crime"**;
- **"any State which has or may have jurisdiction over the crime"**;
- **"any State which could exercise jurisdiction over the crime"**.

c/ Suggested amendments to the text of this alternative draft have been inserted in parentheses.

d/ Some delegations suggested that this term should be reviewed or replaced.

ANNEX IV

Trigger mechanism

A compilation of proposals made in the course of discussion for amendment of the ILC draft statute

Note. This paper follows the original text of the ILC draft statute, which is reproduced in ordinary type. Delegations' proposals for amendment appear in bold type. Where a deletion of text has been proposed, the original text will be surrounded by parentheses in bold type. Where an addition to the text has been proposed, the original text will be interrupted by square brackets which contain the proposed addition in bold type.

This compilation is not exhaustive. The texts included do not reflect any generally held views. The Committee did not discuss these texts and does not wish to prejudge the future positions of delegations.

I. Article 21

1. The Court **(**may exercise its**)** [**shall have**] jurisdiction **(**over a person with respect to a crime**)** referred to in article 20 (**f**):

(a) in a case of genocide, a complaint is brought under article 25(1);

(b) in any other case, a complaint is brought under article 25(2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) by the State which has custody of the suspect with respect to the crime ("the custodial State") [**in accordance with international law**]; **(**and**)**

(ii) by the State on the territory of which the act or omission in question occurred [**if applicable**].

2. If, with respect to a crime to which paragraph 1(b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Three proposals for replacing article 21

Proposal No. 1

[1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 in accordance with the provisions of this Statute if:

(a) the matter is referred to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations;

(b) a complaint is lodged by an interested State in accordance with article 25;

(c) the matter was notified to the Prosecutor and he/she concludes that there is sufficient basis for a prosecution in accordance with articles 26 and 27.

2. In the case of subparagraphs 1(b) and (c) the Court may exercise its jurisdiction only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 22 and if national jurisdiction is either not available or ineffective or if those States have deferred the matter to the Court.]

Proposal No. 2

[1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if a complaint is brought under article 25 and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(a) by the State which has custody of the suspect with respect to the crime ("custodial State"); and

(b) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.]

Proposal No. 3

[1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in Article 20 and in accordance with the provisions of this Statute if:

(a) the matter is referred to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(b) a complaint is brought by a State Party;

2. The Court shall not exercise its jurisdiction with respect to the crime referred to in article 20(d) unless the Security Council has first determined that a State has committed an act of aggression.]

II. Article 22

Two proposals for replacing article 22.

Proposal No. 1

[1. A State which becomes party to this Statute thereby accepts the inherent jurisdiction of the Court with respect to crimes referred to in article 2, paragraphs (a) to (d).

2. With regard to the crimes referred to in article 20(e) a State party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute, or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration. (Para. 2 shall be maintained only if "treaty crimes" are included in the statute)]

Proposal No. 2

[The Court shall satisfy itself that it has jurisdiction in any case brought before it.]

[Part 3 has optional jurisdiction of the Court.]

(If the so-called "treaty crimes" were to be comprised in the jurisdiction of the Court, this part would organize the regime thereof along the lines contained in article 21(1)(b), (2) and article 22 of the present ILC draft statute.)

III. Article 23

Proposal No. 1

[1. A State Party may lodge a complaint with the Prosecutor alleging that a crime referred to in article 20 appears to have been committed.

2. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

3. In a case to which article 21(a) applies, a complaint is not required for the initiation of an investigation.]

Proposal No. 2

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes (referred to) **[specified]** in article 20 as a consequence of the referral of a (matter) **[situation]** to the Court by the Security Council (acting under Charter VII of the Charter of the United Nations.) **[in accordance with the terms of such referral.]**

/...

Delete original paragraph 2 of the ILC draft.

2. No prosecution may be commenced under this Statute arising from a [**dispute or**] situation (which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.) [**pertaining to international peace and security or an act of aggression which is being dealt with by the Security Council without the prior consent of the Security Council.**]

[**If "aggression" were to be included in article 20, then, according to the above proposal, the retention of the original paragraph 23(2) of the ILC draft statute would be necessary, with the renumbering of the above-stated subparagraph 2 as article 23(3).**]

Other proposals

For paragraph 1

Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a (matter) [**case**] to the Court by the Security Council (acting under Chapter VII of the Charter of the United Nations) or [**acting under Chapters VI and VII of the Charter of the United Nations**]. [**As far as possible a referral shall specify the circumstances of the alleged crime and be accompanied by such supporting documentation as is available to the Security Council.**]

For paragraph 2

The determination of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject-matter of which is the act of aggression.

For paragraph 3

(a) No prosecution may be commenced under this Statute arising from (a situation which is being dealt with by the Security Council) [**a situation where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations**] as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

(b) [**The determination by the Security Council under paragraph 2 above shall not be interpreted as in any way affecting the independence of the Court in deciding on the commission of the crime of aggression by a given person.**]

(c) [**Should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation.**]

(d) **[Prosecution may be commenced under this Statute except where the Security Council decides in accordance with Article 27 of the Charter that it arises from a situation in respect of which effective action is being taken by the Security Council (as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter).]**

Proposals were also made to retain paragraph 1 of article 23 and to delete paragraphs 2 and 3.

Proposals were also made for the deletion of article 23.

IV. Article 24

[The Court shall satisfy that it has jurisdiction in any case brought before it.]

V. Article 25

Three proposals for replacing article 25

Proposal No. 1

[A complaint may be lodged by any interested State which is a State party to the Statute.

A State is deemed to be interested in the matter if it has jurisdiction over the case or if a victim of the alleged crime is or was its national.

3. The complaint shall be submitted to the Prosecutor alleging that a crime under the jurisdiction of the Court appears to have been committed.

4. As far as possible the complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.]

Proposal No. 2

[1. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

2. As far as possible a complaint shall specify the circumstance of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

3. In a case to which article 23(1) applies, a complaint is not required for the initiation of an investigation.]

Proposal No. 3

[1. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint that refers a situation to the Prosecutor as to which such a crime appears to have been committed and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with commission of such crime.

(An alternative would be to require at least one other State party which accepts the jurisdiction of the Court under article 22 with respect to the same crime to join in the complaint and affirm that in their joint opinion the crime is a most serious one of interest to the international community as a whole.)

2. As far as possible a complaint shall describe

(a) the facts which indicate a crime within the jurisdiction of the Court has been committed,

(b) the specific crime or crimes which the complainant State believes have been committed,

(c) the identity and location of any persons suspected of committing such crimes, and the factual basis therefor,

(d) a description of evidence or believed sources of evidence pertinent to the investigation, and

(e) whether the complainant State or other States may be investigating or prosecuting the matter.

The complainant State may request or the Prosecutor may require that the complaint or any part thereof remain confidential pending the Prosecutor's review.]

3. In a case to which article 23(1) applies, a complaint is not required for the initiation of an investigation by the Prosecutor.]

Other proposals

For paragraph (1)

A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide (appears to have) [**has**] been committed. (the same correction for para. (2))

For paragraph (4 bis)

[The Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The

Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.]

It was also proposed to place article 25(4 bis) in article 22 as article 22 bis. The role of the prosecutor as envisaged in article 25(4 bis) may require amendments to other articles of the statute including a new article 12(1) which will read:

[The Procuracy is an independent organ of the Court responsible for the initiation of investigations ex officio or on the basis of information from any source, as provided in article 22 bis (article 25(4 bis)), a referral of a situation by the Security Council pursuant to article 23(1), or a complaint by a State Party as provided in article 35, and for the conduct of prosecution. A member of the Procuracy shall not seek, or act on, instructions from any external source.]

ANNEX V

Cooperation between the court and national jurisdictions

A compilation of proposals made in the course of the discussion for amendment of the ILC draft statute

Note. This paper is designed to reflect proposals of delegations made during the course of the discussion on the issue of complementarity. It follows the original text of the draft statute for an international criminal court, which is represented in ordinary type. Delegations' proposals for amendments are represented in bold type.

Where a deletion of text has been proposed, the original text is surrounded by parentheses which are in bold type, and where an addition of text has been proposed, the original text is interrupted by square brackets, which contain the proposed additional text in bold type. For example, in article 28(1) it has been proposed that the words "(the provisional arrest of a suspect)" be replaced by the words "[**the arrest of a suspect before indictment**]".

This compilation is not exhaustive. The texts included do not reflect any generally held views. The Committee did not discuss these texts and does not wish to prejudge the future positions of delegations.

I. Article 28

Arrest

"1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for (the provisional arrest of a suspect) [**the arrest of a suspect before indictment**] if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless (provisionally arrested) [**arrested before indictment**]."

Insert new **article 28(1)(c)**

["(c) or there is suspicion that the accused may obstruct the investigation by destruction of evidence or imperil witnesses."]

("2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency will allow.)

OR

[2. (a) The Prosecutor shall transmit the warrant to the State where the suspect is located, along with a request for the arrest of the suspect and

a statement of the reasons to believe that the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to file an indictment within 90 days. The arrest request should be accompanied by a description of the person sought, together with all available information that will help to identify and locate the person. Where necessary under the law of the State where the suspect is located, the Prosecutor should also provide a brief summary of the facts of the case and the reasons why pre-indictment arrest is believed to be necessary.

(b) Where a suspect is arrested before indictment and an indictment is subsequently filed against the suspect, the Prosecutor shall transmit a copy of the indictment to the State with custody of the accused, along with a request that the accused be surrendered to the court for trial. The request should be followed by such other additional material as may be required by the law of the State with custody of the accused.

(c) In the case where a suspect has been arrested before indictment, if before the expiry of 90 days, a decision is taken by the Prosecutor not to indict the suspect or the Presidency decides not to confirm the indictment, the Prosecutor shall immediately advise the custody State of that fact.]

"3. **[In the case where no pre-indictment warrant has been obtained,]** as soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest (and transfer) of the accused ..."

Insert new **article 28(3)bis**

["The Prosecutor shall transmit the warrant to the State where the accused is located along with a request that the accused be arrested and surrendered to the court for trial. The request should be accompanied by a description of the person sought, together with all available information that will help identify and locate the person. The request should be followed by such other additional material as may be required by the law of the State where the accused is located."]

II. **Article 29**

Pre-trial detention or release

A. Insert new **article 29(1)**

["1. The State that has received a pre or post indictment warrant and a request for the arrest of a suspect shall immediately, in accordance with its law, take steps to arrest the suspect on the basis of the warrant of the Court or by obtaining a domestic warrant for arrest based on the court's warrant and request."]

B. Insert new **article 29(2)**

"2. A person arrested shall be brought promptly before a judicial officer (of the State where the arrest. The judicial officer) [**in the custody State who**] shall determine, in accordance with (the procedures applicable in) [**the law of**] that State, that (the warrant has been duly served) [**the person has been arrested in accordance with the proper process**] and that the (rights of the accused) [**person's rights**] have been respected. a/"

C. Article 29(3) and insert new **article 29(3)bis**

"3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of (the arrest or detention) [**any arrest warrant or order of detention issued by the Court**]. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation."

[**"3bis. A person arrested shall have the right to apply to a judicial officer in the custody State for interim release pending the indictment or surrender of the person. The custody State shall ensure that the views of the Prosecutor on interim release are brought to the attention of the judicial officer."**]

D. Article 29(4) and insert new **article 29(4)bis**

"4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State."

[**"4bis. In the case of a person arrested before indictment, if no indictment is received within 90 days of that person's arrest or the Prosecutor advises the custody State that no indictment will be filed, the person shall be released from custody or any terms of interim release. The release of the person shall not preclude that person's re-arrest should an indictment and warrant be submitted at a later date."**]

E. Insert new **article 29(5)bis**

[**"5bis.** (A person arrested) [**An accused surrendered to the Court**] may apply to the Presidency for [**interim**] release pending trial. The Presidency may release the person (unconditionally or on bail) [**with or without conditions**] if it is satisfied that the accused will appear at the trial."] b/

III. **Article 51** c/

Cooperation and judicial assistance

OR

Cooperation and mutual assistance

OR

Powers of the Court as regards requests for cooperation of States

"(1. States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.)

OR

[[States parties shall afford to the Court the widest possible measure of mutual assistance] OR **[States parties and the Court shall afford each other reciprocal cooperation and mutual assistance] in connection with [the] criminal investigations and proceedings under this Statute.]**"

A. Insert new **article 51(1)bis**

["51(1)bis. States parties and the Court shall give absolute priority to the request under paragraph 1 of this article even over concurring requests from other States not having primary jurisdiction according to the Statute."]

"2. (The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:)

OR

[Mutual assistance shall include but not be limited to the following types of assistance:]

OR

[The Court may request the cooperation and assistance of any State party on matters including, but not limited to:]

OR

[The cooperation and assistance under paragraph 1 shall consist of:]

(a) the identification and location of **[suspects, witnesses or any other]** persons **[and objects] [or items]**;

(b) the taking of testimony [**or statements**] and the production of evidence [**including records of government agencies**] d/;

OR

[the taking of statements of suspects, witnesses or any other persons, including testimony on oath;]

OR

[taking evidence or statements from persons [whether or not under oath];

AND

(b)bis. assisting in the availability of detained persons or others to give evidence or assist investigations;]

(c) [**effecting**] the service of documents;

OR

[the forwarding of evidentiary documents and seizable evidentiary materials;]

[(d) [executing] OR **[the execution of] [requests for] searches and seizures;]**

OR

[search and seizure;]

(e) the arrest or detention of persons e/;

OR

[the arrest, detention and surrender of the accused;

AND

(e)bis. the arrest, detention and surrender of witnesses and experts;]

[(f) the provisional detention of fugitives;]

[(g) the extradition of fugitives;]

[(h) examining objects and sites;]

OR

[inspections and expert examination;]

[(i) [the] providing [of] information and evidentiary items;]

[(j) [the] providing [of] originals and certified copies of relevant documents and records;]

[(k) [the] taking [of] action as permitted by law to prevent injury to or the intimidation of a witness or the destruction of evidence;]

[(l) the approval of transportation of persons surrendered through its territory;]

[(m) the temporary transfer of a person in custody, with his consent, in order to provide testimony or other assistance to the Court; or]

(n) any other (request) [**assistance**] which may facilitate the administration of justice, including provisional measures as required. f/

OR

[any other form of assistance not prohibited by the laws of the Requested State Party.]

OR

[States parties and the Court may grant each other any other cooperation or assistance under paragraph 1 of this article which may facilitate the investigations and proceedings under this Statute. g/]"

B. Insert new **article 51(3)**

["3. [Requests for assistance should be submitted in writing, including facsimile or other electronic record, by the [Court, Prosecutor, Registrar] to the authority designated by States parties to receive such requests.]

OR

[The request under paragraph 1 shall be made in written form through diplomatic channels.]

OR

[Requests for assistance and cooperation under this article shall be submitted in writing or be forthwith reduced to writing. If the Court is the requesting party, the request shall be submitted by the [Court, Presidency, Prosecutor, Registrar] to the authority designated by the States parties to receive such requests.]

The requests should contain such information as may be required by the requested State party in order for the request to be executed under its law."]

C. Insert new **article 51(4)**

["4. Except where the Court has made a finding that the case to which the request related is admissible under section 35, the requested State may postpone or refuse assistance where in its opinion execution of the request would interfere with an ongoing investigation or prosecution of the same matter in the requested State."]

D. Insert new **article 51(5)**

["5. Subject to paragraph 3, provided that the request contains sufficient information to meet the requirements of the law of the requested State party, the requested State party shall execute the request as expeditiously as possible and transmit the results to the [Court, Prosecutor, Registrar].

[If the request does not contain sufficient information for execution, the requested State party shall immediately advise the [Court, Prosecutor, Registrar] and outline the additional information required.]

OR

[If a requested State considers the information and evidence provided by the Court insufficient as a basis for decisions whether to offer assistance, it may seek further information and evidence from the Court as it deems necessary.]

All the documents to be provided by the Court to State party shall be accompanied by a duly certified translation in the language of the party."]

E. Insert new **article 51(6)**

"6. (Upon receipt of a request under paragraph 2:

(a) in a case covered by article 21 (1) (a), all States parties;

(b) in any other case, States parties which have accepted the jurisdiction of the Court with respect to the crime in question;)

[**States parties**] shall respond without undue delay to the request. h/"

F. Insert new **article 51(7)**

["7. The Court may also make a request under paragraph 1 to any Non-State party. Non-State parties may honour the request and provide necessary assistance in accordance with their national laws."]

IV. ALTERNATIVE **Article 51**

Obligation to cooperate and general provisions

["1. Obligation to cooperate. States parties shall, in accordance with the provisions of this Part, cooperate with the Court in its investigation and prosecution of crimes under this Statute. A State shall not deny a request for cooperation except as specifically provided in this Part.

2. Transmittal of Requests. Requests for cooperation may be made by the Court [or Prosecutor], and shall be transmitted through diplomatic channels, unless the Court and the Requested State agree on another mode for transmitting requests.

3. Language of Requests. Requests for cooperation shall be in an official language of the Requested State unless otherwise agreed."]

V. **Article 52**

Provisional measures

(It has been proposed that article 52 of the ILC draft statute be deleted, as its main provisions will be covered under other articles as revised.)

VI. ALTERNATIVE **Article 52**

["1. Requests under article 51 shall include the following as applicable:

"(a) a brief statement of the purpose of the request and of the assistance sought, including the legal basis [and grounds] for the request;

"(b) information concerning the identity of the person, subject of the request, as precise as possible;

"(c) a description of the [essential] facts underlying the request;

"(d) information concerning the complaint or charge to which the request relates and concerning the basis for the jurisdiction of the requesting party.

"2. A requested party which considers the information provided insufficient to enable the request to be complied with may seek further information.

"3. Provided that the request contains sufficient information to meet the requirements of the relevant law of the administering party, the latter shall execute the request as expeditiously as possible and transmit the results to the requested party."]

VII. ALTERNATIVE Article 52

Legal assistance

["1. Scope of assistance. States parties shall, in accordance with the provisions of this article, comply with requests for legal assistance by the Court [or Prosecutor] with respect to the investigation or prosecution of a crime under the Court's jurisdiction, which assistance shall include: ... i/

"2. Form and content of requests.

"(a) Requests for legal assistance shall be in writing. However, the requested State may accept a request in another form in emergency situations. The request shall include the following:

(i) a description of the subject matter and the nature of the investigation or prosecution to which the request relates, including the specific offence involved;

(ii) a description of the evidence, information, other assistance sought and any particular procedure to be followed;

(iii) a statement explaining the nexus between the evidence, information, or assistance sought and offence being investigated or prosecuted, and of the purpose for which the evidence, information, or other assistance is sought;

(iv) such information as may be required under the law of the requested State in order to execute the request; and

(v) such other information as may be necessary or appropriate to assist the requested State in executing the request.

"(b) If the requested State requires supplemental information in order to execute the request, it shall promptly inform the Court and describe the additional information that is required.

"3. Execution of requests.

"(a) The requested State shall promptly execute the request and transmit the result to the Court [or Prosecutor].

"(b) The requested State shall, to the extent permitted by its law, execute the request in accordance with any procedures specified in the request and permit persons specified in the request to be present at or assist in execution of the request.

/...

"4. Denial of requests.

"(a) A State may deny a request for assistance, in whole or in part, if:

[(i) except with respect to an offence under article 21(a)(1) (genocide), it has not accepted the jurisdiction of the Court with respect to the offence which is the subject of the investigation or prosecution;]

(ii) execution of the request would prejudice its security or similar essential interests;

(iii) the authorities of the Requested State would be prohibited by its domestic laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence under its national jurisdiction;

(iv) execution would interfere with an ongoing criminal investigation or proceeding in that State;

(v) execution would conflict with an obligation to provide assistance to another State in its investigation or prosecution; or

(vi) the request is not made in conformity with the provisions of this article;

"(b) Assistance may not be denied on the basis of paragraph (a)(iv) or (a)(v) if the Court has already declared the case giving rise to the request for assistance to be admissible, and

(i) in a case under paragraph (a)(iv), its decision took into consideration the investigation or proceedings pending in the requested State; or

(ii) in a case under paragraph (a)(v), the other State is a State party, and the Court's decision took into consideration the investigation or proceedings in the other State.

"(c) Before denying a request for assistance, the requested State shall consider whether assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time. If the Court or Prosecutor accepts the assistance subject to conditions, it shall abide by them.

"(d) If a request for assistance is denied, the requested State shall promptly inform the Court or Prosecutor of the reasons for the denial."]

VIII. Insert new article

Provisional detention

["1. In cases of urgency, when the Court makes a request for provisional detention, notifying the requested Party that a warrant of arrest has been issued or a sentence has been imposed for an offence specified in article [ ], the requested State party may provisionally detain the person sought in accordance with its national laws.

"2. The request for provisional detention shall describe the identity of the person to be sought and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

"3. If the Court fails to present the request for extradition within [thirty] days from the date of provisional detention, the person detained shall be set at liberty; provided that this stipulation shall not prevent the requested State from instituting a proceeding with a view to extraditing the person sought if a request for extradition is subsequently received.

"4. When ratifying this Statute, States parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse provisional detention and shall specify elements which must be included in a written request for provisional detention. States parties shall not refuse a request for detention for reasons other than those indicated."]

IX. **Article 53**

Transfer of an accused to the Court

("1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.")

(It has been proposed that article 53 be redrafted as follows and placed earlier in the Statute with articles 28 and 29. As the revised article 28(3)bis j/ now covers the matters in paragraph 1 of the ILC draft (above) it has been proposed that the latter is deleted with subparagraph 2 thus becoming subparagraph 1.)

"2. Upon receipt of a request (under paragraph 1) [**from the Court under article 28 asking that an accused person be surrendered to the court for trial,**]

"(a) all States parties:

(i) in a case covered by article 21(1)(a), or

(ii) which have accepted the jurisdiction of the Court with respect to the crime in question;

shall (subject to paragraphs 5 and 6) take immediate steps to (arrest and transfer) [**respond to the request by transferring or extraditing**] the accused to the Court;

"(b) in the case of a crime to which article 20(e) applies, a State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer [**or extradite**] the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution;

"(c) in any other case, a State party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer [**or extradite**] the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

"3. The transfer [**or extradition**] of an accused to the Court constitutes, as between States parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution."

Insert new article 53(3)bis

["3bis. To facilitate transfer or extradition the Court may enter into agreements, arrangements or other instruments which will outline the process for transfer or extradition from any State party to the Court."]

("4. A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.")

OR

["4. (1) Subject to subparagraph (2) where the requested State party is in receipt of a request from the Court that an accused be surrendered for trial and a request or requests for the extradition of the same person, the requested State party shall determine whether the person shall be sent to the Court or a requesting State. In making this decision the requested State shall have regard to the relevant circumstances, and in particular, to:

(a) if the requests relate to different offences, the relative seriousness of those offences;

(b) the relative strength of the cases;

(c) the time and place of the commission of the offences;

(d) the respective dates of the requests;

(e) the nationality of the person sought; and

(f) the ordinary place of residence of the person.

"4. (2) Where the Court has determined that a case is admissible under article 35, a State party which accepts the jurisdiction of the Court with respect to the crime shall give priority to a request by the Court for the surrender of an accused over requests for extradition from other States."]

Insert new article 54(4)bis

["4bis. Where no agreement or arrangement exists a State party in receipt of a request shall immediately advise the Court as to whether transfer or extradition will be used to respond to the request and what additional information if any is needed in order for the request to be executed."]

"5. A State party may delay complying ...

"6. A State party may, within 45 days ..."

X. ALTERNATIVE article 53

Surrender of an accused or convicted person to the Court

["1. Obligation to surrender. States parties shall, in accordance with the provisions of this article, surrender to the Court persons found within their territory whom the Court has charged with or convicted of an offence specified in [article 20].

"2. The request and supporting documents. A request for surrender shall be in writing and shall be supported by:

(a) documents, statements, or other types of information which describe the identity and probable location of the person sought;

(b) information briefly describing the essential facts and procedural history of the case; and

(c) in the case of a person who has been [charged] [accused] but not yet convicted:

(i) a copy of the warrant of arrest and of the indictment, [or if an indictment has not yet been issued, the document issued by the Court which specifies the offences with which the person has been accused of committing]; and

/...

(ii) such documents, statements or other types of information regarding the commission of the offence and the accused's role therein, which may be required by the laws of the requested State; however, in no event may the requested State's requirements be more burdensome than those applicable to request for extradition pursuant to its treaties with other States; or

(d) in the case of person who has been found guilty:

(i) a copy of the judgement of conviction;

(ii) information establishing that the person sought is the person to whom the finding of guilt refers; and

(iii) if the person sought has been sentenced, a copy of the sentence imposed and a statement establishing to what extent the sentence has been carried out.

"3. Supplemental information. If it appears that supplemental information is needed to meet the requirements of this article, the requested State shall request such supplemental information from the Court. Any proceedings in the requested State may be continued, and the person sought may be detained, for such period as may be necessary to afford the Court a reasonable opportunity to provide the supplemental information requested.

"4. Provisional arrest.

(a) In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for surrender and supporting documents under paragraph 3.

(b) The request for provisional arrest shall contain:

(i) a description of the person sought and information regarding the probable location of such person;

(ii) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(iii) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(iv) a statement that a request for surrender of the person sought will follow.

(c) A person who is provisionally arrested may be discharged from custody upon the expiration of [sixty] days from the date of provisional arrest if the requested State has not received the formal request for surrender and the supporting documents specified under paragraph 2.

/...

(d) The fact that the person sought has been discharged from custody pursuant to subparagraph (c) shall not prejudice the subsequent rearrest and surrender of that person if the request for surrender and supporting documents are delivered at a later date.

"5. Grounds for denial of a request.

(a) The requested State may deny a request for surrender if:

[(i) except with respect to an offence under article 21(a)(1) (genocide), it has not accepted the jurisdiction of the Court with respect to the offence in question;]

(ii) the requested State has received and decided to grant the request of another State for the extradition of the person, as provided in paragraph 8;

(iii) the person is being proceeded against or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his surrender is sought, unless the Court has declared the case before it to be admissible under articles 35 or 42, notwithstanding such proceedings or such prior conviction or acquittal; or

(iv) the request does not conform to the requirements of this article.

(b) The requested State may not deny a request for surrender on the grounds that:

(i) the person sought is a national of the requested State; or

(ii) the offence for which the person is sought is a political or military offence.

(c) the requested State may defer the surrender of a person or its decision on a request for surrender if:

(i) the person sought is being proceeded against in the requested State;

(ii) proceedings are pending in the requested State regarding a request from another State for the extradition of the person sought; or

(iii) the requested State or a State which has made a request for extradition of the person with the requested State has commenced a proceeding before the Court challenging the admissibility of case in question, or the exercise of the Court's jurisdiction over the case or the person sought.

/...

"6. Decision and surrender.

(a) The requested State shall promptly notify the Court of its decision on the request for surrender.

(b) If the request is denied in whole or in part, the requested State shall provide an explanation of the reasons for the denial.

(c) If the request is granted, the authorities of the requested State shall agree with the Court on the time and place for the surrender of the person sought.

"7. Temporary surrender. If a request for surrender has been granted with respect to a person who is being proceeded against or serving a sentence in the requested State, the requested State may temporarily surrender the person to the Court for purpose of prosecution. Similarly, the Court may temporarily surrender a person for purposes of prosecution to a requesting State. A person temporarily surrendered shall be kept in custody and shall be returned at the conclusion of the proceedings for which his temporary surrender was sought, in accordance with conditions to be determined by mutual agreement between the requesting State and the Court.

"8. Multiple requests for extradition or surrender.

(a) If the requested State also receives a request from a State for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or to extradite the person to the State. In making all its decisions the requested State shall consider all relevant factors, including but not limited to:

(i) whether the extradition request was made pursuant to a treaty;

(ii) if the offences are different, the nature and gravity of the offences;

(iii) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence;

(iv) the possibility of subsequent surrender or extradition between the Court and the State requesting extradition; and

(v) the chronological order in which the requests were received.

(b) The requested State may not, however, deny a request for surrender made under this article in deference to another State's request for extradition of the same person for the same offence, if the State requesting extradition is a State party, and the Court has ruled the case before it admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.

/...

"9. Transit.

(a) A State party shall authorize transportation through its territory of a person being surrendered to the Court by another State. A request by the Court for transit shall be transmitted through diplomatic channels, unless otherwise agreed. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.

(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit. If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing."]

XI. Insert new article

Extradition

["1. The Court may request the extradition of a fugitive to States Parties as regards offences specified in article [ ] when the Court has issued a warrant of arrest.

"2. States Parties shall undertake to extradite to the Court any fugitive requested for extradition and found in their territories in accordance with this Statute and their national laws.

"3. When a State Party honours the request for extradition, it shall promptly detain the fugitive under its national laws.

"4. When ratifying this Statute, States Parties shall inform the Secretary-General of the United Nations of the conditions under which they would refuse extradition and shall specify elements which must be included in a written request for extradition. States Parties shall not refuse extradition for reasons other than those indicated.

"5. The request for extradition shall include a description of the identity of the fugitive and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

"6. The following do not constitute conditions under which a requested State may refuse extradition, irrespective of paragraph 4:

"(a) The act constituting the offence for which extradition is requested does not constitute an offence under the laws, regulations or ordinances of the requested State;

/...

"(b) The requested State does not deem it appropriate to honour the request;

"[(c) The requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing the person concerned on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;]

"[(d) The requested State has grounds for believing that the person whose extradition is requested has been or would be subjected in the Court to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in a criminal proceeding, as contained in the International Covenant on Civil and Political Rights, article 14.]

"7. All the offences specified in article [ ] shall not be deemed to be offences of a political nature as regards extradition under this Statute.

"8. States Parties shall not be bound to extradite their own nationals, but may extradite them at their discretion.

"9. If a State Party decides not to extradite a fugitive who is present in its territory, it shall submit, without undue delay, the case to its competent authority for the purpose of prosecution, through proceedings in accordance with its national laws. This provision shall not apply in the following cases:

"(a) if it is deemed that under the laws, regulations or ordinances of the requested State it would be impossible to impose or to execute punishment upon the fugitive; if the act constituting the offence for which the extradition is requested was committed in the territory of the requested State; or if the trial therefore would be held in a court of the requested State;

"(b) if there is no probable cause to suspect that the fugitive has committed an act which constitutes an offence for which extradition is requested.

"10. The requested State shall through diplomatic channels promptly notify the Court of its decision as regards the request for extradition."]

XII. Insert new article

Request for assistance in criminal investigation

["1. The Court may make a request to States Parties for assistance as provided in paragraphs [ ] of article [ ] k/ (hereinafter referred to as request for assistance) as regards offences specified in article [ ], either ex officio or upon request of the Prosecution or a defence counsel.

"2. States Parties shall honour and comply with the request for assistance through proceedings according to their national laws.

"3. When ratifying this Statute, States Parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse assistance and shall specify elements which must be included in a written request. States Parties shall not refuse assistance for reasons other than those indicated.

"4. The following conditions do not constitute conditions under which a requested State may refuse to provide assistance, irrespective of paragraph 3:

"(a) when the act constituting the offence for which extradition is requested does not constitute an offence under the laws, regulations or ordinances of the requested State;

"(b) when the requested State does not deem it appropriate to honour the request.

"5. All the offences specified in article [ ] shall not be deemed to be offences of a political nature as regards a request for assistance under this Statute."]

XIII. Article 55

Rule of speciality

"(1. (A person) [**An accused**] (transferred) [**surrendered**] to the Court (under) [**pursuant to**] article 53 shall not be (subject to prosecution or punishment) [**proceeded against, sentenced or detained**] [**by the Court**] for any crime other than that for which the person (was transferred) [**has been surrendered**].)

OR

"[**1. A person extradited under this Statute shall not, except under any one of the following circumstances, be detained, prosecuted, tried, or punished for an offence other than that for which extradition was effected:**

"(a) when a person extradited commits an offence after extradition;

"(b) when a requested State has consented to his detention, prosecution, trial, or punishment for an offence other than that for which the extradition has been effected.]

"2. (([**Information or**] Evidence provided under this Part shall not, if the State when providing it so requests, be used as evidence) [**A State providing evidence under this part may require that the evidence not be used**] for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41(2).)

/...

OR

[Evidence provided by States Parties under this Statute shall not be used in connection with any offence other than that which is mentioned in the request for assistance as being a subject of investigation unless the requested State offers its consent.]

"3. The Court may request the State concerned to waive the requirements of paragraphs 1 and 2, for the reasons and purposes [**to be**] specified in the request. [**In a case of paragraph 1, the request shall be accompanied by an additional warrant for arrest and by a legal record of any statement made by the accused with respect to the offence.**]

OR

[The State concerned shall have the authority to waive the limitations of paragraphs 1 or 2, if so requested by the Court.]"

Insert new **article 55 bis**

["Except as provided for in article 55, the Court shall not, without the consent of the requested State Party, surrender to another party or third State a person surrendered to the Court and sought by the other party or third party in respect of offences committed before his surrender. The requested party may request the production of the documents mentioned in article 57."]

XIV. Insert new article

Expenses

["The Court shall bear the expenses related to the translation of documents and the transportation of a person transferred, unless the Parties agree otherwise. The Requested State shall pay other expenses incurred by reason of legal assistance or transfer proceedings. If expenses of an extraordinary nature will be required to fulfil the request, the Court and the requested State shall consult to determine the terms and conditions under which the request will be executed as well as the manner in which the costs shall be borne."]

XV. **Article 56**

Cooperation with States not parties to this Statute

"(States not parties to this Statute may assist in relation to the matters referred to in this Part on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.)

OR

"[The Court [or Prosecutor] may request the cooperation of States not parties to this Statute in relation to the matters referred to in this Part on the basis of comity, an ad hoc arrangement, or through entry into agreements with such States.]"

XVI. Insert new article

Approval of transportation of persons surrendered through the territories of the State Parties

["States Parties shall give approval for the transportation of the persons to the Court through their territories in accordance with their national laws."]

XVII. Insert new article

Supplementary agreements

["The Court [or Prosecutor] may enter into supplementary agreements or arrangements with States parties to serve the purpose of, give practical effect to, or enhance the provisions of this Part."]

Notes

a/ Formerly in ILC draft statute as article 29(1).

b/ Formerly in ILC draft statute as article 29(2).

c/ The following composite draft of article 51 is designed to incorporate all the written proposals of delegations, which expand on the provisions in the ILC draft statute. The exact content and numbering of the paragraphs and subparagraphs differs between delegations.

d/ It was also proposed that this be divided into two subparagraphs.

e/ Formerly in ILC draft statute as article 51(2)(d).

f/ Formerly in ILC draft statute as article 51(1)(e).

g/ This additional text was proposed as a separate paragraph, article 51(4).

h/ Formerly in ILC draft statute as article 51(3).

i/ These proposals are included in article 51(2)(a) to (d) and (m) to (n) above.

j/ See sect. I above.

k/ This proposal referred to paragraphs which are included in this compilation in article 51(2)(a) to (d) and (h) above.

/...

ANNEX VI

Compilation of proposals on other subject-matters

Note. This compilation is not exhaustive. The texts included do not reflect any generally held views. The Committee did not discuss these texts and does not wish to prejudge the future positions of delegations.

Article 18

Insert new paragraph 2:

"The accused and his/her lawyer may communicate with the Court in the native language of the accused. At the request of accused or his/her lawyer, the Court shall provide necessary translation."

Article 37

Delete paragraph 1.

Insert the following subparagraph after the chapeau of present paragraph 2:

"(a) the accused refuses to appear and the State fails to act in accordance with article 54;"

Insert new article 47 bis

"1. After a judgement of conviction, the Trial Chamber can, if appropriate, at the request of the Prosecutor, or the victim, or at its own initiative, hold a special hearing to determine the matter of the restitution of property and just compensation to the victim.

"2. If the Trial Chamber finds the accused not guilty, it shall award him costs and just compensation."

Review clause

Adding of crimes to the jurisdiction of the Court

"1. [Five] years after the entry into force of this Convention the Depositary shall convene a meeting of States Parties to review the list of crimes contained in article [20] of the Statute with the view to considering whether other crimes shall be added to the list.

"Such other crimes shall be added to the list contained in article [20] of the Statute if an amendment to that effect is adopted at the meeting of States Parties by a [two-thirds] majority of the States Parties present and voting.

"An amendment adopted shall enter into force with regard to those States Parties which have deposited their instrument of acceptance of the amendment on the thirtieth day following the deposit of the [tenth] instrument of acceptance. For each State whose instrument of acceptance is deposited after the entry into force of the amendment, the amendment shall enter into force on the thirtieth day after the deposit by such State of its instrument of acceptance.

"2. Subsequently, at the request of a State Party, the Depositary shall, upon approval of a majority of States Parties, convene a meeting of States Parties to review the list of crimes contained in article [20] of the Statute with the view to considering whether other crimes shall be added to the list in accordance with paragraph 1."

Final clauses

Insert the following article:

"Reservations

"No reservations may be made to this Convention."
